

NO. **83-305**

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ALEXANDER L. STEVAS,
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IN THE SUPREME COURT
OF THE
UNITED STATES

OCTOBER TERM, 1983

THE PEOPLE OF THE STATE OF CALIFORNIA,

Petitioner,

v.

ALBERT WALTER TROMBETTA, et al.,

Respondents.

PETITION FOR WRIT OF CERTIORARI
TO THE CALIFORNIA COURT OF APPEAL,
FIRST APPELLATE DISTRICT

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QUESTIONS PRESENTED

- (1) Does the duty to preserve evidence under federal due process forbid the use in a drunk driving case of a breath testing machine which automatically expels and thus destroys the breath sample during the test process?
- (2) Does the duty to preserve evidence under federal due process compel law enforcement to gather evidence for use of the defendant?

PARTIES TO PROCEEDING

The California Court of Appeal consolidated four separate cases in this proceeding, all of which involved drunk-driving prosecutions. In addition to respondent Trombetta (No. A016358), the decision affects Michael Gene Cox (No. A016374), Gregory Moller Ward (No. A017265), and Gale Bernell Berry (No. A017266). The Cox case (No. A016374) was itself a consolidated case which involved, in addition to Cox, Thomas Nelson Muldoon, Clinton James Brown, Densel Lee Furner, Patricia Jane Keeffe, Herbert John Berreyessa, and James K. Schneider.

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PETITION FOR WRIT OF CERTIORARI
TO THE CALIFORNIA COURT OF APPEAL,
FIRST APPELLATE DISTRICT

Petitioner, the People of the State
of California, respondent below,
respectfully petitions that a writ of
certiorari issue to the California Court
of Appeal, First Appellate District, to
review the decision of that Court filed
on March 28, 1983, as modified on

April 27, 1983, and held that law enforcement agencies must preserve a sample of the breath of a suspect tested on suspicion of drunken driving, or its equivalent, to satisfy federal due process standards.

OPINIONS BELOW

The opinion filed by the Court of Appeal on March 28, 1983, is reported at 141 Cal.App.3d 400, 190 Cal.Rptr. 319. [Appendix B.] This opinion was substantially modified on April 27, 1983, and the opinion as modified was ordered republished in its entirety appearing at 142 Cal.App.3d 138, ____ Cal.Rptr. ____.

[Appendix A.]

JURISDICTION

On March 28, 1983, the California Court of Appeal for the First Appellate District filed its opinion dismissing

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appeals taken by two groups of defendants^{1/} and granting writs of habeas corpus as to two other groups; the opinion also established a rule binding upon future breath alcohol testing by agencies enforcing California's drunk driving laws. On April 27, 1983, a petition for rehearing was denied, and a substantially modified version of the original opinion was filed. On June 23, 1983, the California Supreme Court denied the People's petition for a hearing.

On July 1, 1983, the Court of Appeal issued an order staying issuance of the remittitur through August 30, 1983, to

1. Although these appeals were dismissed on technical grounds, the decision is specifically applicable to the defendants who brought the appeals, none of whom have yet been tried on the drunk driving charges. As to these persons, the decision amounts to an order suppressing evidence. (See 142 Cal.App.3d at 140, 144; [A-17].)

permit the People to file a petition for certiorari in this Court.

The jurisdiction of this Court is invoked under Title 28, United States Code, section 1257(3).

CONSTITUTIONAL PROVISION INVOLVED

The case involves interpretation of the due process clause of section 1 of the Fourteenth Amendment to the Constitution, which provides, insofar as pertinent, that:

"No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law"

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STATEMENT OF THE CASE

Procedural Background

All of these cases involve efforts by defendants charged with violation of California's drunk driving laws to suppress the results of breath alcohol tests obtained on an Intoxilyzer machine.

In the Trombetta and Cox group of cases, the defendants made a pre-trial motion to suppress the Intoxilyzer test results, which motions were denied by the Municipal Court. The defendants then appealed to the Appellate Department of the Superior Court, which affirmed the Municipal Court, but certified the issue to the Court of Appeal. Although the Court of Appeal held that an appeal to the Appellate Department was not available (142 Cal.App.3d at 140-141; [A-3]), it nevertheless applied its decision to Trombetta and Cox (142

Cal.App.3d at 144; [A-17]) who have not yet been tried. The decision therefore acts as an order suppressing evidence in these two groups of cases.

In the Ward and Berry cases, the defendants had already been convicted of drunken driving and brought writs of habeas corpus in the Court of Appeals challenging their convictions. The decision orders new trials for these defendants at which trials evidence of the breath-test results will be excluded (142 Cal.App.3d at 145; [A-18]).

Facts

Under California law, a drunk driving suspect is given his choice of submitting to a test of his blood, breath, or urine. (Calif. Veh. Code, § 13353(a).) Each of these defendants, after a lawful arrest on suspicion of drunk driving, was given a breath test upon an Intoxilyzer, an approved test

instrument, for the purpose of determining his blood alcohol level. The legal issues turn upon the operation of the instrument itself.

The following explanation of Intoxilyzer operation is found in People v. Miller (1975) 52 Cal.App.3d 666, 668-669, 125 Cal.Rptr. 341, 342:^{2/}

"The subject's breath is captured in a metal chamber, infrared energy of fixed intensity and wave length is passed through the chamber from one

2. People v. Miller provides what is the clearest and most succinct of all Intoxilyzer explanations. In the present case, the Court of Appeal did not quarrel with that explanation and in fact cited it (142 Cal.App.3d at 141-142; [A-7]). Miller, however, found the Intoxilyzer constitutional and rejected the very argument successfully made in Court of Appeal here (52 Cal.App.3d at 669-670, 125 Cal.Rptr. at 342-343). It was this portion of Miller with which the Court of Appeal "fundamentally disagreed." (142 Cal.App.3d at 143-144; [A-14].)

side of a photo-electric cell on the other side. Alcohol absorbs light of the fixed wave length. The device computes the loss of energy, translates the result in terms of the grams of alcohol per 100 milliliters of blood, and prints the result upon a card. In the prescribed operation of the device, clean air is first tested, then the breath of the subject. The chamber is then purged by blowing clear air through it, the clear air is tested, and all three results appear upon the printed card. The two tests of clear air constitute a test of the machine, and should show zero alcohol content. It is apparent that no test result, save the printout

card, was available for preservation."

The following facts concerning the operation of the Intoxilyzer were found by the Municipal Court judge in the Trombetta case:^{3/}

"It appears to this court that from the testimony elicited and from the evidence submitted, that at best a state when using the 4011-W Intoxilyzer unit, temporarily collects or gathers breath of a tested individual. The chamber which collects this

3. The only factual findings at the trial level were made in the Trombetta case. A copy of Judge Antolini's findings are included as Appendix C. The Cox group of cases came from the same county as Trombetta and were governed by that finding. No factual findings were made in Ward or Berry since the trial court considered itself bound by the decision in People v. Miller (1975) 52 Cal.App.3d 666, 125 Cal.Rptr 341, which has already been quoted.

breath contains it only for a period of time necessary to conduct an analysis of this breath. By the construction of the machine itself, namely that of having two orifices, one for introduction and one for the expulsion of the sample, it appears to the court that the temporary control over the breath makes the ultimate dissipation and destruction of the sample an inherent and obvious consequence of using that particular intoxilyzer unit. The argument that the state is in control of the breath and that by choosing to purge that sample, destroys it, is an argument that in the court's opinion is reductio ad absurdum. Mr. Murray, the defense

witness, stated in substance, that the intoxilyzer collects breath but not for later analysis and then must be purged in order to be useable again. Without an addition to the present intoxilyzer unit it appears to the court that it would be impossible to exercise permanent control resulting in preservation of any sample. Therefore, it would appear to the court that the destruction of any temporarily collected sample would not be through the actions or efforts of the state, but rather through the workings of the machine itself."

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REASONS FOR GRANTING THE WRIT

Years ago in Brady v. Maryland (1963) 373 U.S. 83, this Court established a federal due process requirement to preserve material evidence favorable to the accused. Purporting to apply this standard, the California Court of Appeal held that use of a machine to test the breath of a suspected drunken driver is unconstitutional unless a sample of the defendant's breath, or its equivalent, is preserved. Since the machine is not designed to preserve a sample, and in fact automatically destroys the sample tested by pumping it into the air after the test is run, the decision forbids use of that device which is the overwhelming choice (82%) of California law enforcement agencies. Furthermore, the decision effectively condemns all California breath-testing instruments, none of which preserve breath samples, and hence the

test method used in two-thirds of California's drunk driving cases. As this Court has recognized in South Dakota v. Neville (1983) ___ U.S. ___, ___, 103 S.Ct 916, 920, 74 L.Ed. 748, 755, the importance of enforcing drunk driving laws cannot be overemphasized.

This Court has not addressed the evidence preservation requirement of federal due process for many years, and the Brady duty has received different interpretations by state courts. In California, an earlier appellate decision specifically approved the instrument now condemned, rejecting the very argument now adopted. (People v. Miller (1975) 52 Cal.App.3d 666, 125 Cal.Rptr. 341.) The breath preservation requirement has similarly resulted in a split of authority among other state courts. (See Baca v. Smith (Ariz. 1980) 604 P.2d 617 (required); Garcia v. Dist. Court,

21st Jud. Dist. (Colo. 1979) 589 P.2d 924 (required); State v. Lee (Fla.App. 1982) 422 S.2d 76 (rejected); People v. Reed (Ill.App. 1981) 416 N.E.2d 694 (rejected); State v. Young (Kan. 1980) 614 P.2d 441 (rejected); Montoya v. Metropolitan Court (N.M. 1982) 651 P.2d 1260 (rejected); State v. Larson (N.D. 1981) (rejected); State v. Newton (S.C. 1980) 262 S.E.2d 906 (rejected); State v. Cornelius (N.H. 1982) 452 A.2d 464, 465 (rejected). Only this Court can resolve the dispute.

The decision below essentially requires law enforcement agencies to collect evidence for possible use by the accused--an extension of the Brady doctrine with astounding consequence. We do not believe that was ever intended by Brady, and that a clear statement of the parameters of the federal due process

preservation requirement from this Court is needed.

I

THERE IS NO PRESERVATION
REQUIREMENT WITHOUT PRAC-
TICAL PHYSICAL POSSESSION.

The Intoxilyzer, as described in People v. Miller (1975) 52 Cal.App.3d 666, 668-669, 125 Cal.Rptr. 341, 342, and by Judge Antolini here, temporarily holds a breath sample blown into it by a drunk driving suspect, and then after the infrared analysis is made, automatically pumps the sample out into the room air. This purging is necessary to run the test itself since a sample of room air is also tested on the machine to insure that the machine is operating accurately. It is also necessary to pump out the air in order to use the instrument again with other suspects. This is how the machine was designed by

its manufacturer.^{4/}

Whatever the preservation standard of Brady v. Maryland (1963) 373 U.S. 83, it does not extend to evidence which the state did not possess in a form permitting preservation as a practical manner. What Brady requires is that once the state has taken evidence into its possession, it cannot throw it away. This duty cannot extend to something that the state never had in the first place. (People v. Miller (1975) 52 Cal.App.3d 666, 669-670, 125 Cal.Rptr. 341, 343; State v. Young (Kan. 1980) 614 P.2d 441, 446.) As noted in Miller, supra, "The test by intoxilyzer . . . may have 'gathered' evidence in the sense of placing the breath in the chamber, but

4. All breath testing instruments approved in California destroy the sample. In the Breathalyzer, the sample is chemically consumed; in the gas chromatograph devices, the sample is burned.

it was not evidence of which the government could 'take possession.'

Up until now, it has been held that a test procedure which by its nature destroys the material tested does not violate federal due process. (See People v. Vick (1970) 11 Cal.App.3d 1058, 1066, 90 Cal.Rptr. 236, 241-242 (autopsy; body destroyed); State v. Lightle (Kan. 1972) 502 P.2d 834 (chemical test; pills destroyed); State v. Carlson (Minn. 1978) 267 N.W.2d 170 (chemical test; bloodstain destroyed); State v. Cloutier (Me. 1973) 302 A.2d 84 (chemical test; pill destroyed); Partin v. State (Ga. 1978) 232 S.E.2d 46 (chemical test; cocaine destroyed); United States v. Love (5th Cir. 1973) 482 F.2d 213, 218-219 (chemical test; gun powder residue destroyed); State v. Thomas (Wash. 1969) 454 P.2d 203 (chemical test; marijuana sample

destroyed). In rejecting a Brady attack on another breath testing instrument, the Kansas Supreme Court was correct when it concluded that "the prosecution cannot be accused of failing or refusing to disclose exculpatory evidence which does not exist." (State v. Young (Kan. 1980) 614 P.2d 441, 446.)

II

THERE IS NO REQUIREMENT TO
GATHER MATERIAL FOR THE
ACCUSED, ESPECIALLY WHERE
OF SPECULATIVE VALUE.

California's evidence preservation requirement arises from People v. Hitch (1974) 12 Cal.3d 641, 645-646, 650, 117 Cal.Rptr. 9, 12-13, 15, 527 P.2d 361, 364-365, 367, which found the federal genesis in Giglio v. United States (1971) 405 U.S. 150, 153-154; Brady v. Maryland (1963) 373 U.S. 83, 87; and United States v. Bryant (D.C. Cir. 1971) 439 F.2d 642, 651. In Moore v. Illinois (1972) 408

U.S. 783, 794-795, this Court explained that:

"The heart of the holding in Brady is the prosecution's suppression of evidence, in the face of a defense production request, where the evidence is favorable to the accused and is material either to guilt or to punishment. Important, then, are (a) suppression by the prosecution after a request by the defense, (b) the evidence's favorable character for the defense, and (c) the materiality of the evidence."

Brady does not require the state to take affirmative steps and gather evidence for the accused. Yet that is what the California Court of Appeal insists upon here. As noted in People v. Miller (1975) 52 Cal.App.3d 666, 670, 125

Cal.Rptr. 341, 343, with the Intoxilyzer "The only element reducible to possession was the printout card, which has been preserved." In finding the facts below, Judge Antolini observed that "Without an addition to the present intoxilyzer unit . . . it would be impossible to exercise permanent control resulting in preservation of any sample." Requiring the state to develop some system for retaining a breath sample represents affirmative conduct for the sole benefit of the accused--something never before required as a Brady duty. The difficulty posed to law enforcement by such an obligation is apparent. As the court observed in People v. Miller, supra,

"The unwarranted extension . . . could have strange and unsettling results. If all evidence which can be made demonstrative must be so

transformed, we shall encounter problems with extrajudicial declarations which, with fortuitous foresight, could have been tape-recorded, and eyewitness observations of events which could have been photographed."

In rejecting the claimed duty to preserve breath in State v. Young (Kan. 1980) 614 P.2d 441, 446, and the opinions of courts which required it, the Kansas Supreme Court observed:

"The basis for this requirement in this case is not well defined. These courts seem to be aware that other courts do not require an extra sample. They hold in a general way, however, that it is incumbent upon the state to employ regular procedures to preserve

evidence for the defendants. They require a state agent, in the regular performance of his duties, to reasonably foresee what evidence 'might be favorable to the accused' and to obtain and preserve the same for the defendant's use. [Citation.] The difficulty of accepting this logic in the present case is apparent. The item in question here is merely a sample of breath from the accused himself, which he alone can furnish for independent testing by his own physician as authorized by . . . [statute]."

Like Kansas, California law specifically provides that a drunk-driving suspect has an absolute right to have his own sample collected and tested by his own expert. (Cal. Veh. Code, § 13354(b).) Police

officers are forbidden from interfering with that right. (See People v. Superior Court (Scott) (1980) 112 Cal.App.3d 602, 605, 169 Cal.Rptr. 412, 413.) Due process does not require more. (State v. Young, supra; State v. Cornelius (N.H. 1982) 452 A.2d 464, 465.)

Nor could a Brady duty to preserve a breath sample possibly arise unless it were proven that a practical means of preservation exists which permits a reliable retest. As the Florida Court of Appeal noted in State v. Lee (Fla.App. 1982) 422 S.2d 76, 78:

"Although some courts have held that failure by the state to automatically preserve a breath sample is tantamount to suppression of evidence, those holdings have come where the defendant has shown that the

preservation was scientifically possible. . . . We have found no case which has considered the defendant's due process contention concerning the state's failure to produce a breath sample without evidence and findings at the trial level that it was scientifically possible for the state to collect and preserve such a sample."

(Accord, People v. Reed (Ill.App. 1981) 416 N.E.2d 694, 697.) The trial court below did not make such a finding. The California Court of Appeal refused to address the issue.

The Court of Appeal placed great reliance on Garcia v. Dist. Court, 21st Jud. Dist. (Colo. 1979) 589 P.2d 924, 928-929, in which there was evidence that samples could be preserved. In view of the subsequent field experience with the

"Colorado method" outline in Montoya v. Metropolitan Court (N.M. 1982) 651 P.2d 1260, 1261, in which the head of Colorado's Department of Health testified that the retests were erroneous 80-90 percent of the time, it can hardly be contended that a "preserved" breath sample would yield material evidence for the accused. Not only are there no breath analysis instruments approved for use in California^{5/} which themselves capture and preserve a breath sample, but there are no capturing devices approved to attach to them. As a

5. Under California law, law enforcement agencies may only use instruments which have been tested and evaluated by the state Department of Health. (Calif. Health & Saf. Code., § 436.52.) "The intoxilyzer has been subjected to rigid scrutiny and testing by a state agency qualified in this technical field. It has been approved for use under the detailed regulations prescribed by that agency." (People v. Miller (1975) 52 cal.App.3d 666, 670, 125 Cal.Rptr. 341, 343.)

matter of fact, the scientific body which the California Legislature established to advise the Department of Health on matters of this sort (Calif. Health & Saf. Code, § 436.50) has recently concluded that no device currently exists anywhere which would permit a reliable retest of a breath sample. (Advisory Committee on Alcohol Determination, Department of Health, Notes of Meeting of August 31, 1982, p. 29.) This unreliability has prompted a number of state courts to reject retention requirements. (See State v. Phillipe (Fla.App. 1981) 402 S.3d 33, 34; State v. Larson (N.D. 1981) 313 N.W.2d 750, 755-756; id.; State v. Newton (S.C. 1980) 262 S.E.2d 906, 909 n. 1.) Federal courts have never found a Brady violation where the destroyed evidence would not tend to exculpate the defendant or had no real evidentiary value. (See Norris v.

Slayton (4th Cir. 1976) 540 F.2d 1241, 1243-1244; Fields v. Alaska (9th Cir. 1975) 524 F.2d 259, 260-261; Bergenthal v. Cady (7th Cir. 1972) 466 F.2d 635, cert. den., 409 U.S. 1109; Riley v. Sigler (8th Cir. 1971) 437 F.2d 258, 259-260; see also United States v. Agurs (1976) 427 U.S. 97, 109 n. 16.) Brady does not require preservation of "any evidence which might conceivably aid the defense in the preparation of its case." (Williams v. Wolf (8th Cir. 1973) 473 F.2d 1049, 1054.) "This extension of the Brady doctrine is not justified as a matter of constitutional law." (Edwards v. Oklahoma (D. Okla. 1976) 429 F.Supp. 668, 671, rev'd on other grounds, 577 F.2d 1119 (10th Cir. 1978).)

An even greater step beyond Brady was made when the Court of Appeal required the state to "preserve the captured evidence or its equivalent for

the use of the defendant." (142 Cal.App.3d at 144; emphasis added.) Of the devices approved in California, only the Intoxilyzer is non-destructive; the others physically consume the sample in the test process. (See fn. 4, supra.) This would mean that a completely different sample than even the police used would have to be taken for the defendant's testing. And in the case of the Intoxilyzer, even the retention devices used in Colorado do not preserve the breath; they purport to capture the alcohol portion of the breath with an absorbant. In other words, there is no device whatsoever which would permit the defendant to retest--however unreliable--the same sample in the same form as that tested by the police.

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CONCLUSION

Petitioner respectfully requests this Court to grant certiorari to review this significant federal issue and provide a clear exposition of the standard which should guide the various state courts.

DATED: August 22, 1983

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APPENDIX A

IN THE COURT OF APPEAL OF THE
STATE OF CALIFORNIA
FIRST APPELLATE DISTRICT
DIVISION FOUR

THE PEOPLE, A016358
Plaintiff and Respondent,
v. (Sonoma Sup.
Ct. No.
ALBERT WALTER TROMBETTA, 209-C)
Defendant and Appellant.

THE PEOPLE, A016374
Plaintiff and Respondent,
v. (Sonoma Sup.
Ct. No.
MICHAEL GENE COX, et al., 215-3)
Defendants and Appellants.

In re GREGORY MOLLER WARD A017265
on Habeas Corpus. 1 Crim. 23779

In re GALE BERNELL BERRY A017265
on Habeas Corpus. 1 Crim 22517

These cases arise, in diverse procedural settings, from misdemeanor prosecutions for driving under the influence of intoxicating liquor (formerly Veh. Code

§§ 23101, subd. (a), or 23102, subd. (a); now §§ 23153, subd. (a), or 23152, subd. (a), respectively). The issue raised is whether intoxilyzer breath results are rendered inadmissible in a trial for driving under the influence of intoxicating liquor by virtue of the failure of law enforcement officials to preserve a retestable breath sample.

In each case the municipal court denied the defendant's common law motion to suppress the evidence obtained from an intoxilyzer breath test. Each defendant then appealed to the superior court which affirmed the lower court order; the cases were then certified for transfer to this court. In the Trombetta and Cox groups of cases this court accepted transfer. It appears that Trombetta and its companion case have not proceeded to trial. The record does not indicate whether the cases in the Cox group have proceeded to

trial; no judgment was entered in these cases.

An appeal may not be taken from a pretrial order of the municipal court. (Code Civ. Proc., § 904.2.) The correct procedure in Trombetta and Cox would therefore have been for the defendants to wait until a judgment was entered in the municipal court and then appeal that judgment. Because no appealable order was challenged in Trombetta and Cox those appeals should have been dismissed by the appellate department of the superior court. (People v. Superior Court (Scott) (1980) 112 Cal.App.3d 602, 606.)

In the Ward and Berry cases judgments of conviction were followed by superior court appeals; transfers to the Court of Appeal were denied whereupon those defendants petitioned the Supreme Court for writs of habeas corpus. The

Supreme Court issued orders in Ward and Berry to show cause before this court why relief should not be granted.

Each defendant was arrested for driving under the influence of alcohol. (Formerly Veh. Code §§ 23101, subd. (a), or 23102, subd. (a); now §§ 23153, subd. (a), or 23152, subd. (a), respectively). Each was asked to select any one of three blood alcohol level tests (breath, blood, or urine). Law enforcement officers urged the defendants to select the breath test and each did select that test. The breath tests were conducted on an Omicrom Intoxilyzer. Each defendant's breath registered an alcohol level of at least 0.10. No defendant was told that a breath sample would be saved.

The Legislature has established a presumption that a driver whose blood alcohol level is less than 0.05 percent is not under the influence of an

alcoholic beverage. If the blood alcohol level is between 0.05 percent and 0.10 percent, no presumption arises. (Veh. Code, § 23155, subd. (a).) However, another statute provides "It is unlawful for any person who has a 0.10 percent or more, by weight, of alcohol in his or her blood to drive a vehicle upon a highway or upon other than a highway in areas which are open to the general public. . . ." (Veh. Code, § 23152, subd. (b).) Thus, the statute establishes guilt where chemical blood alcohol tests prove that the percent of alcohol is 0.10 percent or more, without any showing of actual impairment.

Given the importance of accurate determination of blood alcohol levels, and the greater convenience of breath testing as opposed to testing of blood or urine, the Legislature has directed the State Department of Health Services

to establish by regulation, procedures to be used by law enforcement agencies in administering breath tests for the purposes of determining the concentrations of alcohol in a person's blood. (Health & Saf. Code, § 436.52.) These regulations are contained in title 17 of the California Administrative Code, sections 1220 et seq. Three of the breath testing devices which require discussion had been approved by the Department of Health Services as of December 20, 1979: the intoxilyzer, the breathalyzer, and the intoximeter field crimper-indium tube encapsulation kit.

A brief description of the operation of the intoxilyzer follows: Prior to any test, the device is purged by pumping clean air through it until readings of 0.00 are obtained. The breath test requires a sample of "alveolar" (deep lung) air (Cal. Admin. Code, tit. 17,

§ 1219.3); to assure that such a sample is obtained, the subject is required to blow air into the intoxilyzer at a constant pressure for a period of several seconds. A breath sample is captured in the intoxilyzer's chamber and infrared light is used to sense the alcohol level. Two samples are taken, and the result of each is indicated on a print-out card. The two tests must register within 0.02 of each other in order to be admissible in court. After each test, the chamber is purged with clean air and then checked for a reading of zero alcohol. (See People v. Miller (1975) 52 Cal.App.3d 666, 668-669.) The machine is calibrated weekly, and the calibration results, as well as a portion of the calibration samples, are available to the defendant.

The breathalyzer operates on a completely different principle. (See

People v. Hitch (1974) 12 Cal.3d 641, 644.) To conduct a breathalyzer test, the breath sample is captured in a glass ampoule containing exactly three cubic centimeters of a chemical solution. If alcohol is present, it changes the translucency of the solution. The alcoholic content is then measured by shining a beam of light through the solution. The test ampoule and the test solution can then be retained for retesting by the defendant.

Finally, the operation of the intoximeter field crimper-indium tube encapsulation kit must be considered. This "kit" can be used in the field to collect a breath sample which is separate from the sample collected by the intoxilyzer. The device is independent from the breath testing devices and is in effect only a breath collection as opposed to a breath testing device. The subject blows into

an indium tube which captures the breath sample. The indium tube is a soft metal device used to capture and preserve a breath specimen for later analysis. The tube originally is in a single piece but when the sample is blown into the tube, it can be crimped to hold the breath sample in three separate compartments. These containers can then be placed in a gas chromatograph (intoximeter) device which will test the sample for blood alcohol content. The gas chromatograph is an approved device for blood alcohol determination; the indium tube is approved for use with the gas chromatograph if the sample is tested within 14 days of collection. (Instruments Approved for Breath Alcohol Analysis, Dept. of Health, Dec. 20, 1979.)

Defendants contend that there are three grounds upon which this court should require suppression of the

evidence obtained from the intoxilyzer tests: the duty of the prosecution to preserve evidence, equal protection, and requirements of informed consent. We deal only with the first ground.

The contention is that under People v. Hitch, supra, 12 Cal.3d 641, the failure of law enforcement personnel to capture and preserve a retestable breath sample violated due process and rendered the intoxilyzer results inadmissible. In Hitch, the Supreme Court held that a law enforcement agency conducting a chemical test for alcohol has a duty to preserve and disclose all material evidence which the agency has gathered. The court held that a due process violation occurred when the defendant's test specimen and test solution from a breathalyzer test were discarded. The defendant's eventual attempts to utilize discovery to verify independently the alcoholic content of

the ampoule, to ascertain that exactly three centimeters of the solution had been used, and to examine the glass ampoule itself for any defects which would alter the alcohol reading were thus unfairly frustrated. (Id., at pp. 649-650.)

The Hitch court, in considering the admissibility of "breathalyzer" results, determined initially that the results of the blood alcohol test "by their very nature constitute material evidence on the issue of guilt or innocence upon a charge of drunk driving." (Id., 12 Cal.3d at p. 647.) The court held that the investigative agency involved in the test has a duty not only to disclose such material evidence but also to preserve it. Accordingly, the court stated that "where, as here, such evidence cannot be disclosed because of its intentional but nonmalicious destruction

by the investigative officials, sanctions shall . . . be imposed for such nonpreservation and nondisclosure unless the prosecution can show that the governmental agencies involved have established, enforced and attempted in good faith to adhere to rigorous and systematic procedures designed to preserve the [evidence]. The prosecution shall bear the burden of demonstrating that such duty to preserve the [evidence] has been fulfilled." (Id., at pp. 652-653.) If this burden is not met, the results of the test are to be excluded at trial. Since the Hitch rule implements a federal due process standard, (id., at pp. 645, 646) it is unaffected by California Constitution, article I, section 28, subdivision (d). (See Brosnahan v. Brown (1982) 32 Cal.3d 236.)

In the present case, it is conceded that no effort was made to capture breath

specimens for later testing by the defense. Defendants contend that the intoxilyzer evidence should therefore have been excluded from trial.

In denying many recent motions to exclude intoxilyzer results, many lower courts have relied on People v. Miller, supra, 52 Cal.App.3d 666. In Miller, the Court of Appeal examined "the question [of] whether the recent decision of the Supreme Court (People v. Hitch, 12 Cal.3d 641) should be extended to render inadmissible the results of all chemical tests of breath conducted by use of the "Omicron Intoxilyzer.'" (People v. Miller, supra, 52 Cal.App.3d at p. 668.) The Miller court determined that "Hitch merely holds that evidence which the prosecution once possesses must be held. The test by intoxilyzer . . . may have 'gathered' evidence in the sense of placing the breath in the chamber, but

it was not evidence of which the government could 'take possession.' The only element reducible to possession was the printout card, which has been preserved." (Id., at pp. 669-670.)

We disagree fundamentally with the Miller characterization of what happens when a breath sample is taken. That is, in our view, such a taking is the collection of evidence within the Hitch rationale. The question then is whether the specimen may be exhausted in testing without taking available steps to obtain and preserve another specimen for retesting.

A similar situation confronted the Colorado Supreme Court in Garcia v. Dist. Court, 21st Jud. Dist. (Colo. 1979) 589 P.2d 924. Colorado, like California, uses urine, blood or breath tests for a determination of alcohol level, and

samples of blood and urine "are customarily preserved for the use of the defense and to insure that the test is accurate." (At. p. 926.) In further similarity to California, a presumption of driving under the influence arises from a certain level of alcohol in the blood. (Ibid.)

Two fact situations were before the Garcia court. In one, the breathalyzer tests and ampoules were destroyed in accordance with standard police procedures; in the other, the defendant was given a "Luckey Alco-Analyzer" breath test, which could not preserve a sample for testing. In both cases, the defendants' motions to suppress the results of the tests were denied.

Recognizing that in the first situation a sample of the defendant's breath "could have been preserved", and in the second other methods existed to preserve

the defendant's breath, the court concluded: "The failure of the state to collect and preserve evidence, when those acts can be accomplished as a mere incident to a procedure routinely performed by state agents, is tantamount to suppression of that evidence." (At. pp. 929-930.) "We hold, therefore, that in all cases where a defendant elects to submit to a breath test to determine his blood alcohol level, he must be given a separate sample of his breath at the time of the test or the alcoholic content of his breath in a manner which will permit scientifically reliable independent testing by the defendant, if that test is to be used as evidence. [Citations.]" (At. p. 930.)

We are persuaded that the reasoning of the Colorado court -- paralleling the Hitch rationale -- is sound and that the same result should prevail in California.

Due process demands simply that where evidence is collected by the state, as it is with the intoxilyzer, or any other breath testing device, law enforcement agencies must establish and follow rigorous and systematic procedures to preserve the captured evidence or its equivalent for the use of the defendant. (People v. Hitch, supra, 12 Cal.3d at pp. 652-653.)

With the exception of the cases reviewed in this decision (i.e., A016358, A016374, A017265, A017266) this holding will apply prospectively only to tests performed after this decision has become final. Although we place primary reliance upon People v. Hitch, supra, 12 Cal.3d 641, it may reasonably be presumed that law enforcement activities in breath taking have been performed in good faith reliance upon People v. Miller, supra, 52 Cal.App.3d 666, which,

as we have noted, reached a conclusion contrary to our holding today.

The Trombetta and Cox groups of appeals are dismissed; in the Ward and Berry proceedings, writs of habeas corpus will issue granting new trials at which the intoxilyzer evidence will be excluded.

Certified for Publication.

Poche, J.

I concur:

Rattigan, Acting P.J.

People v. Trombetta, (Cox, Ward & Berry)
A016358, A016374, A017265, A017266

People v. Trombetta, et al.
A016358, A016374, A017265, A017266

I concur fully in the judgment and write separately only to emphasize that by this decision we do not prescribe or recommend any particular devices or procedures but hold simply that those before us in these cases do not satisfy the due process requirements of People v. Hitch (1974) 12 Cal.3d 641. In each case, the arresting officer urged the defendant to choose the breath rather than the blood or urine test but failed to inform him that as a consequence of this selection no sample would be retained. In none did the officer advise the driver of his right to preservation of a breath sample and obtain from him a waiver of that right. The Arizona Supreme Court has held that such a procedure is constitutionally adequate. (Baca v. Smith (1979) 604 P.2d

617, 618-620.) As no driver here gave a knowing and intelligent waiver of his right to preservation of evidence, that question is not reached here. Similarly, we do not consider here a situation in which police establish and diligently follow rigorous and systematic procedures for preservation of samples but circumstances beyond their control frustrate retention of a sample in a particular instance. As the majority opinion indicates, the core requirement of Hitch is establishment of and adherence to procedures which ensure fairness in the administration of field tests. The responsibility for designing those procedures lies with the Legislature and with state and local law enforcement agencies.

Christian, J.

APPENDIX B

IN THE COURT OF APPEAL OF THE
STATE OF CALIFORNIA
FIRST APPELLATE DISTRICT
DIVISION FOUR

THE PEOPLE, A016358
Plaintiff and Respondent,
v. (Sonoma Sup.
Ct. No.
ALBERT WALTER TROMBETTA, 209-C)
Defendant and Appellant.

THE PEOPLE, A016374
Plaintiff and Respondent,
v. (Sonoma Sup.
Ct. No.
MICHAEL GENE COX, et al., 215-3)
Defendants and Appellants.

In re GREGORY MOLLER WARD A017265
on Habeas Corpus. 1 Crim. 23779

In re GALE BERNELL BERRY A017265
on Habeas Corpus. 1 Crim 22517

These cases arise, in diverse procedural settings, from misdemeanor prosecutions for driving under the influence of intoxicating liquor (formerly Veh. Code

§§ 23101, subd. (a), or 23102, subd. (a); now §§ 23153, subd. (a), or 23152, subd. (a), respectively). The issue raised is whether intoxilyzer breath results are rendered inadmissible in a drunk driving trial by virtue of the failure of law enforcement officials either (1, to preserve a retestable breath sample although a device which preserves breath samples for retesting is available, or (2) to inform the detained motorist that no retestable specimen will be preserved if he selects breath rather than blood or urine as the test medium.

In each municipal court case the defendant moved to suppress evidence obtained from an intoxilyzer breath test. (Pen. Code, § 1538.5.) These motions were denied. Each defendant then appealed to the superior court which affirmed the lower court order; the cases were then certified for transfer to this

court. In the Trombetta and Cox groups of cases this court accepted transfer. It appears that Trombetta and its companion case have not proceeded to trial. The record does not indicate whether the cases in the Cox group have proceeded to trial; no judgment was entered in these cases.

An appeal may not be taken from a pretrial order of the municipal court. (Code. Civ. Proc., § 904.2.) The correct procedure in Trombetta and Cox would therefore have been for the defendants to wait until a judgment was entered in the municipal court and then appeal that judgment. Because no appealable order was challenged in Trombetta and Cox those appeals should have been dismissed by the appellate department of the superior court. (People v. Superior Court (Scott) (1980) 112 Cal.App.3d 602, 606.)

In the Ward and Berry cases judgments of conviction were followed by superior court appeals; transfers to the Court of Appeal were denied whereupon those defendants petitioned the Supreme Court for writs of habeas corpus. The Supreme Court issued orders in Ward and Berry to show cause before this court why relief should not be granted.

Each defendant was arrested for driving under the influence of alcohol. (Formerly Veh. Code §§ 23101, subd. (a), or 23102, subd. (a); now §§ 23153, subd. (a), or 23152, subd. (a), respectively). Each was asked to select any one of three blood alcohol level tests (breath, blood, or urine). Law enforcement officers urged the defendants to select the breath test and each did select that test. The breath tests were conducted on an Omicrom Intoxilyzer. Each defendant's breath registered an alcohol level of at least

0.10. No defendant was told that a breath sample would be saved.

The Legislature has established a presumption that a driver whose blood alcohol level is less than 0.05 percent is not under the influence of an alcoholic beverage. If the blood alcohol level is between 0.05 percent and 0.10 percent, no presumption arises. (Veh. Code, § 23155, subd. (a).) However, another statute provides "It is unlawful for any person who has a 0.10 percent or more, by weight, of alcohol in his or her blood to drive a vehicle upon a highway or upon other than a highway in areas which are open to the general public. . . ." (Veh. Code, § 23152, subd. (b).) Thus, the statute establishes guilt where chemical blood alcohol tests prove that the percent of alcohol is 0.10 percent or more, without any showing of actual impairment.

Given the importance of accurate determination of blood alcohol levels, and the greater convenience of breath testing as opposed to testing of blood or urine, the Legislature has directed the State Department of Health Services to establish by regulation, procedures to be used by law enforcement agencies in administering breath tests for the purposes of determining the concentrations of alcohol in a person's blood. (Health & Saf. Code, § 436.52.) These regulations are contained in title 17 of the California Administrative Code, sections 1220 et seq. Three of the breath testing devices which require discussion were approved by the Department of Health Services as of December 20, 1979: the intoxilyzer, the breathalyzer, and the intoximeter field crimper-indium tube encapsulation kit.

A brief description of the operation of the intoxilyzer follows: Prior to any test, the device is purged by pumping clean air through it until readings of 0.00 are obtained. The breath test requires a sample of "alveolar" (deep lung) air (Cal. Admin. Code, tit. 17, § 1219.3); to assure that such a sample is obtained, the subject is required to blow air into the intoxilyzer at a constant pressure for a period of several seconds. A breath sample is captured in the intoxilyzer's chamber and infrared light is used to sense the alcohol level. Two samples are taken, and the result of each is indicated on a printout card. The two tests must register within 0.02 of each other in order to be admissible in court. After each test, the chamber is purged with clean air and then checked for a reading of zero alcohol. (See

People v. Miller (1975) 52 Cal.App.3d 666, 668-669.) The machine is calibrated weekly, and the calibration results, as well as a portion of the calibration samples, are available to the defendant.

The breathalyzer operates on a completely different principle. (See People v. Hitch (1974) 12 Cal.3d 641, 644.) To conduct a breathalyzer test, the breath sample is captured in a glass ampoule containing exactly three cubic centimeters of a chemical solution. If alcohol is present, it changes the translucency of the solution. The alcoholic content is then measured by shining a beam of light through the solution. The test ampoule and the test solution can then be retained for retesting by the defendant.

Finally, the operation of the intoximeter field crimper-indium tube encapsulation kit must be considered. This

"kit" can be used in the field to collect a breath sample which is separate from the sample collected by the intoxilyzer. The device is independent from the breath testing devices and is in effect only a breath collection as opposed to a breath testing device. The subject blows into an indium tube which captures the breath sample. The indium tube is a soft metal device used to capture and preserve a breath specimen for later analysis. The tube originally is in a single piece but when the sample is blown into the tube, it can be crimped to hold the breath sample in three separate compartments. These containers can then be placed in a gas chromatograph (intoximeter) device which will test the sample for blood alcohol content. The gas chromatograph is an approved device for blood alcohol determination; the indium tube is

approved for use with the gas chromatograph if the sample is tested within 14 days of collection. (Instruments Approved for Breath Alcohol Analysis, Dept. of Health, Dec. 20, 1979.)

Defendants contend that there are three grounds upon which this court should require suppression of the evidence obtained from the intoxilyzer tests: the duty of the prosecution to preserve evidence, equal protection, and requirements of informed consent. We deal only with the first ground.

The contention is that under People v. Hitch, supra, 12 Cal.3d 641, the failure of law enforcement personnel to capture and preserve a retestable breath sample violated due process and rendered the intoxilyzer results inadmissible. In Hitch, the Supreme Court held that a law enforcement agency conducting a chemical test for alcohol has a duty to preserve

and disclose all material evidence which the agency has gathered. The court held that a due process violation occurred when the defendant's test specimen and test solution from a breathalyzer test were discarded. The defendant's eventual attempts to utilize discovery to verify independently the alcoholic content of the ampoule, to ascertain that exactly three centimeters of the solution had been used, and to examine the glass ampoule itself for any defects which would alter the alcohol reading were thus unfairly frustrated. (Id., at pp. 649-650.)

The Hitch court, in considering the admissibility of "breathalyzer" results, determined initially that the results of the blood alcohol test "by their very nature constitute material evidence on the issue of guilt or innocence upon a charge of drunk driving." (Id., 12

Cal.3d at p. 647.) The court held that the investigative agency involved in the test has a duty not only to disclose such material evidence but also to preserve it. Accordingly, the court stated that "where, as here, such evidence cannot be disclosed because of its intentional but nonmalicious destruction by the investigative officials, sanctions shall . . . be imposed for such nonpreservation and nondisclosure unless the prosecution can show that the governmental agencies involved have established, enforced and attempted in good faith to adhere to rigorous and systematic procedures designed to preserve the [evidence]. The prosecution shall bear the burden of demonstrating that such duty to preserve the [evidence] has been fulfilled." (Id., at pp. 652-653.) If this burden is not met, the results of the test are to be excluded at trial. Since the Hitch

rule implements a federal due process standard, (id., at pp. 645, 646) it is unaffected by California Constitution, article I, section 28, subdivision (d). (See Brosnahan v. Brown (1982) 32 Cal.3d 236.)

In the present case, it is conceded that no effort was made to capture breath specimens for later testing by the defense despite the availability of the indium tube encapsulation kit. Petitioners contend that the intoxilyzer evidence should therefore have been excluded from trial.

In denying many recent motions to exclude intoxilyzer results, many lower courts have relied on People v. Miller, supra, 52 Cal.App.3d 666. In Miller, the Court of Appeal examined "the question [of] whether the recent decision of the Supreme Court (People v. Hitch, 12 Cal.3d 641) should be extended to render

inadmissible the results of all chemical tests of breath conducted by use of the "Omicron Intoxilyzer.'" (People v. Miller, supra, 52 Cal.App.3d at p. 668.) The Miller court determined that "Hitch merely holds that evidence which the prosecution once possesses must be held. The test by intoxilyzer . . . may have 'gathered' evidence in the sense of placing the breath in the chamber, but it was not evidence of which the government could 'take possession.' The only element reducible to possession was the printout card, which has been preserved." (Id., at pp. 669-670.) Miller may be factually distinguished in that there, no means had been shown by which to preserve a breath sample; the technology has now evolved so that such preservation is possible by use of the indium tube encapsulation kit. A new analysis is therefore in order.

Here, where the evidence has already been "collected" by the prosecution, the question is whether the specimen may be exhausted in testing without taking available steps to obtain and preserve another specimen for retesting.

The Colorado Supreme Court, confronted with a record that was, like ours, "replete with evidence that a sample of the defendant's breath could have been preserved inexpensively and expediently" held that the "failure of the state to collect and preserve evidence, when those acts can be accomplished as a mere incident to a procedure routinely performed by state agents, is tantamount to suppression of that evidence. It is incumbent upon the state to employ regular procedures to preserve evidence which a state agent, in the regular performance of his duties, could reasonably foresee "might"

be "favorable" to the accused.'" (Garcia v. Dist. Court, 21st Jud. Dist. (Colo. 1979) 589 P.2d 924, 928, 929-930.) We are persuaded that the reasoning of the Colorado court is sound and that the same result should prevail in California.

In breath testing by means of the devices presently approved for use in California, the specimen actually tested cannot be retained. The indium tube, an approved device, can, however, be utilized to capture a contemporaneous specimen and preserve it for later testing. When an intoxilyzer is used, the law enforcement agency must employ rigorous and systematic procedures to ensure the preservation of the captured breath sample, or a contemporaneous similar sample, for testing by the defense unless there is a knowing waiver of that right. As with Fitch, however, this holding will apply only prospectively to tests

performed after this decision has become final with the exception that it will also be applicable to the cases now under review, including those not yet tried in which the present appeals must be dismissed.

It has been suggested that technology exists in the form of a device called "silica gel tubes" whereby the actual breath exhaled into the intoxilyzer could be retained. (See People v. Riggs (Colo. 1981) 635 P.2d 556, 558.) This attachment does not, however, appear on the list of breath testing instruments approved for use in California. Were this device to be approved by the Department of Health Services, it would, of course, provide another alternative method of complying with the Hitch requirements of evidence preservation. Law enforcement agencies are free to use their discretion to

utilize whatever devices are available to meet this duty. Due process does not require the use of any particular instruments. It demands simply that where evidence is collected by the state, as it is with the intoxilyzer, the agencies must establish and follow rigorous and systematic procedures to preserve the captured evidence or its equivalent for the use of the defendant. (People v. Hitch, supra, 12 Cal.3d at pp. 652-653.)

The Trombetta and Cox groups of appeals are dismissed; in the Ward and Berry proceedings, writs of habeas corpus will issue granting new trials at which the intoxilyzer evidence will be excluded.

Certified for Publication.

Poche, J.

I concur:

Rattigan, Acting P.J.

People v. Trombetta, (Cox, Ward & Berry)
A016358, A016374, A017265, A017266

People v. Trombetta, et al.
A016358, A016374, A017265, A017266

I concur fully in the judgment and write separately only to emphasize that by this decision we do not prescribe or recommend any particular devices or procedures but hold simply that those before us in these cases do not satisfy the due process requirements of People v. Hitch (1974) 12 Cal.3d 641. In each case, the arresting officer urged the defendant to choose the breath rather than the blood or urine test but failed to inform him that as a consequence of this selection no sample would be retained. In none did the officer advise the driver of his right to preservation of a breath sample and obtain from him a waiver of that right. The Arizona Supreme Court has held that such a procedure is constitutionally adequate. (Baca v. Smith (1979) 604 P.2d 617, 618-620.) As no driver

here gave a knowing and intelligent waiver of his right to preservation of evidence, that question is not reached here. Similarly, we do not consider here a situation in which police establish and diligently follow rigorous and systematic procedures for preservation of samples but circumstances beyond their control frustrate retention of a sample in a particular instance. As the majority opinion indicates, the core requirement of Hitch is establishment of and adherence to procedures which ensure fairness in the administration of field tests. The responsibility for designing those procedures lies with the Legislature and with state and local law enforcement agencies.

APPENDIX C

JUDGE LAWRENCE G. ANTOLINI
Municipal Court - Department Three
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MUNICIPAL COURT FOR THE COUNTY OF SONOMA
STATE OF CALIFORNIA

THE PEOPLE OF THE STATE)	
OF CALIFORNIA,)	
)	
Plaintiff,)	NO. 78532 TCR
)	NO. 78402 TCR
vs.)	
)	<u>RULING ON</u>
MELINDA PIERSON BERTRAM,)	<u>1538.5</u>
ALBERT WALTER TROMBETTA,)	<u>and</u>
)	<u>OTHER</u>
Defendants.)	<u>MOTIONS</u>
)	

The court hereby denies the 1538.5 and stipulated 402 motion in the above-entitled cases. The court's decision is based upon the evidence and testimony admitted before it and also based upon the briefs and all cases cited by both the people and the defense. I therefore will not be reiterating all the above

mentioned arguments and cases. I will comment, however, upon the most prevalent of the many issues presented. The first of these is a factual as well as a legal issue that must be addressed namely whether or not the breath sample "collected" comes under the auspices of the Hitch and Nation mandates. The art of semantics for many years has been the subject matter of courses taught at many of the outstanding universities in the world. Indeed then, the interpretation and or interpolation of words can only be considered to be accurate, when taken in the light of all the surrounding circumstances of a particular situation. The verb "collect" or "gather together" may be either of a temporary or permanent nature. It appears to this court that from the testimony elicited and from the evidence submitted, that at best a state when using the 4011-W Intoxilizer unit,

temporarily collects or gathers breath of a tested individual. The chamber which collects this breath contains it only for a period of time necessary to conduct an analysis on this breath. By the construction of the machine itself, namely that of having two orifices, one for introduction and one for the expulsion of the sample, it appears to the court that the temporary control over the breath makes the ultimate dissipation and destruction of the sample an inherent and obvious consequence of using that particular intoxilizer unit. The argument that the state is in control of the breath and that by choosing to purge the sample, destroys it, is an argument that in the court's opinion is reductio ad absurdum. Mr. Murray, the defense witness, stated in substance, that the intoxilizer collects breath but not for later analysis and

then must be purged in order to be usable again. Without an addition to the present intoxilizer unit it appears to the court that it would be impossible to exercise permanent control resulting in preservation of any sample. Therefore, it would appear to the court that the destruction of any temporarily collected sample would not be through the actions or efforts of the state, but rather through the workings of the machine itself. Therefore, the court finds the cases of the Hitch and Nation are not violated where the state uses the above-described intoxilizer unit in that the state never had permanent possession of the sample, therefore had no election to make since on that unit permanent retention is impossible without modifications. The above referred to intoxilizer unit was approved by the State of California in 1973; further there have been

improvements upon the basic unit until the present AW series. The court finds that the intent of the Legislature is therefore to accept the machine as it exists without any attachments which would permanently preserve the temporarily collected samples of breath, since these attachments have been available and yet there has not been withdrawal or qualification of the state approval of the intoxilizer.

Addressing now the question of whether the defendant has the right to be advised that if she takes the breath tests as presently given in Sonoma County, that she will not have a sample preserved. The court find that §13353 of the Vehicle Code and subsequent sections are not constitutionally guaranteed, rather they are administrative policy with the immediate purpose to obtain the best evidence of the blood

alcohol content of a person believed to be driving while under the influence of an alcoholic beverage. Further, the purpose of the above sections are to avoid the possible violence which could erupt if forcible tests were made upon a recalcitrant and belligerent inebriate in order to obtain the best evidence.

§1219.3 of Article 5, Title 17 CAC does not provide for a breath sample although 1219.1 and 1219.2 provide for the retention of blood and urine samples respectively. It has been argued by the defense that at the time of the regulations it was not possible to retain the breath. It appears to this court that in the time that has passed, the Legislature has had more than ample opportunity to ammend this particular area of the law and yet the Legislature has knowingly and purposefully chosen not to mandate the retention of breath samples.

In summary the court then finds that the state in this case did not possess the breath sample in the sense and or context of the Hitch and Nation decisions and further that there is no constitutional requirement that defendant be advised of the fact that only two of the three tests have samples that are statutorily required to be preserved.

DATED: May 7th, 1981

(LAWRENCE G. ANTOLINI)
JUDGE OF THE MUNICIPAL COURT

CERTIFICATE OF SERVICE BY MAIL

CHARLES R. B. KIRK, a member of the Bar of the United States Supreme Court, hereby certifies that on August 22, 1983, a copy of the annexed Petition for Certiorari was served by mail upon the counsel of record for each of the parties respondent by depositing a copy in the United States Mail at the United States Post Office in the Federal Building, 455 Golden Gate Avenue, San Francisco, California, with first-class postage prepaid, and properly addressed as follows:

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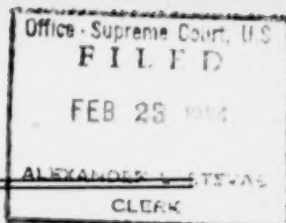
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DATED: August 22, 1983, at
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CHARLES R. B. KIRK

No. 83-305



In The
Supreme Court of the United States
October Term, 1983

THE PEOPLE OF THE STATE OF CALIFORNIA,
Petitioner,

vs.

ALBERT WALTER TROMBETTA, et al.,
Respondents.

JOINT APPENDIX

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**RELEVANT DOCKET ENTRIES IN CALIFORNIA
COURTS UP TO CONSOLIDATION IN
CALIFORNIA COURT OF APPEAL**

**The People of the State of California
v. Albert Walter Trombetta**

**Sonoma County Municipal Court No. 78532 TCR
Sonoma County Superior Court No. 209-C
Court of Appeal (1st App. Dist., Div. 4) No. A016358**

Sonoma County Municipal Court No. 78532 TCR

- 2 Feb 1981 Complaint Filed**
- 11 Feb 1981 Plea Entered, "Not Guilty"**
- 4 Mar 1981 Request & Demand for Disclosure &
Inspection of Evidence Filed**
- 23 Mar 1981 Motion for Suppression as Evidence,
Motion in Limine, and for Protective
Order Filed**
- 30 Mar 1981 Evidentiary Hearing [before Antolini]**
- 7 May 1981 Ruling Denying 1538.5 and Other Motions**
- 2 Jun 1981 Notice of Appeal Filed**

Sonoma County Superior Court No. 209-C

- 20 Jan 1982 Decision Denying Motion to Suppress**
- 26 Jan 1982 Petition for Rehearing and Application
for Certification Filed**
- 17 Feb 1982 Order Denying Rehearing and
Certifying for Transfer to Court of Appeal**

Court of Appeal (1st App. Dist., Div. 4) No. A016358

24 Mar 1982 Appeal Transferred

**The People of the State of California
v. Michael Gene Cox**

Sonoma County Municipal Court No. 77262 TCR
 Sonoma County Superior Court No. 215-3
 Court of Appeal (1st App. Dist., Div. 4) No. A016374

Sonoma County Municipal Court No. 77262 TCR

22 Dec 1980 Complaint Filed

11 Feb 1981 Plea Entered, "Not Guilty"

13 Apr 1981 Motion to Suppress Evidence, for
 Protective Order, Points & Authorities &
 Declarations in Support Thereof Filed

19 May 1981 Declaration of Michael Gene Cox in
 Support of Motion to Suppress Filed

25 Jun 1981 Supplemental Points & Authorities in
 Support of Defendant's Motion to
 Suppress Filed

10 Jul 1981 Motion Denied

30 Jul 1981 Notice of Appeal and Stipulation
 [Trombetta Hearing Applies] Filed

Sonoma County Superior Court No. 215-3

20 Jan 1982 Decision Denying Motion to Suppress

9 Feb 1982 Petition for Rehearing and Application
 for Certification Filed

25 Feb 1982 Order Denying Rehearing and
 Certifying for Transfer to
 Court of Appeal

Court of Appeal (1st App. Dist., Div. 4) No. A013674

24 Mar 1982 Appeal Transferred

The People of the State of California
 v. Gregory Moller Ward

Contra Costa County Municipal Court
(Walnut Creek-Danville) No. 31381-7

Contra Costa County Municipal Court
(Walnut Creek-Danville) No. 32153-9

Contra Costa County Superior Court
Nos. 25717 & 25718 (Consolidated)

Court of Appeal (1st App. Dist., Div. 3) 1/Crim. No. 23780

Supreme Court Crim. No. 22560

Court of Appeal (1st App. Dist., Div. 4) No. A017265

Contra Costa County Municipal Court
(Walnut Creek-Danville) No. 31381-7

- 24 Jul 1980 Complaint Filed
- 13 Aug 1980 Plea Entered, "Not Guilty"
- 26 Feb 1981 Motion for Pre-Trial Discovery and
Alternative Motion to Exclude Results
of Intoxilyzer Filed
- 9 Jun 1981 Motion to Suppress Denied
Case Submitted on Police Report
Found Guilty
- 9 Jul 1981 Sentenced: 18 months probation, \$355 fine,
\$108 penalty, must participate in Drinking
Driver Program
- 21 Jul 1981 Notice of Appeal Filed

Contra Costa County Municipal Court
(Walnut Creek-Danville) No. 32153-9

- 9 Oct 1980 Complaint Filed
- 20 Oct 1980 Plea Entered, "Not Guilty"
- 18 Feb 1981 Motion for Pre-Trial Discovery and
Alternative Motion to Exclude Results of
Intoxilyzer Test Filed

- 9 Jun 1981 Motion to Suppress Denied
Case Submitted on Police Report
Found Guilty
- 9 Jul 1981 Sentenced: 18 months probation, 48 hours
county jail, \$355 fine, \$108 penalty, must
participate in Drinking Driver Program
- 21 Jul 1981 Notice of Appeal Filed

Contra Costa County Superior Court
Nos. 25717 & 25718 (Consolidated)

- 4 Dec 1981 Order of Conviction Affirmed, Certified to
Court of Appeal

Court of Appeal (1st App. Dist., Div. 3) 1/Crim. No. 23780
30 Dec 1981 Certification Denied

Supreme Court Crim. No. 22560

- 9 Apr 1982 Habeas Corpus Petition Filed
- 28 Apr 1982 Order to Show Cause Issued; Returnable in
Court of Appeal, Division 4

The People of the State of California
v. Gale Bernell Berry

Contra Costa County Municipal Court
(Walnut Creek-Danville) No. 29684-8

Contra Costa County Superior Court No. 25592
Court of Appeal (1st App. Dist., Div. 3) 1/Crim. No. 23780

Supreme Court Crim. No. 22517

Court of Appeal (1st App. Dist., Div. 4) No. A017266

Contra Costa County Municipal Court
(Walnut Creek-Danville) No. 29684-8

- 4 Feb 1980 Complaint Filed
- 20 Mar 1980 Plea Entered, "Not Guilty"
- 5 Sep 1980 Motion for Discovery, Memorandum of
Points & Authorities in Support of Motion
for Discovery, Declaration in Support of
Motion for Discovery Filed
- 20 Nov 1980 Motion to Exclude Results of an Intoxilyzer
Test & Points & Authorities in Support Filed
- 28 Apr 1981 Motion to Suppress Denied
Case Submitted on Police Report
Found Guilty
- 19 May 1981 Notice of Appeal Filed

Contra Costa County Superior Court No. 25592

- 4 Dec 1981 Order of Conviction Affirmed; Certified
to Court of Appeal

Court of Appeal (1st App. Dist., Div. 3) 1/Crim. No. 23780

- 30 Dec 1981 Certification Denied
 - 28 Apr 1982 Order to Show Cause Issued; Returnable
in Court of Appeal, Division 4
-

II

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DEMEO & DEMEO

Demeo Building - 1022 Mendocino Avenue
Santa Rosa, California 95401
(707) 545-3232
Attorneys for Defendant

**MUNICIPAL COURT OF CALIFORNIA, COUNTY
OF SONOMA**

No. 78532 TCR

PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiffs,

vs.

ALBERT WALTER TROMBETTA,

Defendant.

**REQUEST AND DEMAND FOR DISCLOSURE
AND INSPECTION OF EVIDENCE**

(Filed March 4, 1981)

To GENE L. TUNNEY, District Attorney of Sonoma
County, California:

ALBERT WALTER TROMBETTA, Defendant here-
in, respectfully requests and demands that you disclose

to Defendant or his counsel, and permit them, or either of them, to inspect, copy, hear, examine, and analyze, not later than March 16, 1981, any and all evidence favorable to said Defendant or relevant or material to the guilt, innocence, or punishment of said Defendant, known to you or which by the exercise of due diligence should be known to you, and which is or are in your possession, custody, or control or accessible to you or other law enforcement officers or persons from you can obtain same.

The items so requested to be disclosed and inspected, copied, heard, and examined include, but are not limited to, the following:

See Exhibit "A" attached hereto and made a part hereof.

This request and demand shall be deemed continuing so as to require you to supply any further evidence relevant or material to Defendant's guilt, innocence, punishment and items of a like nature as requested above, between the time you comply with this request and demand until any sentence may be imposed on Defendant in this proceeding.

If you do not comply with this request by the above-stated time, a motion will be made to compel compliance with this request and demand and for sanctions to be imposed for non-compliance.

This request and demand is made pursuant to *Brady v. Maryland* (1963) 373 US 83, 83 S.Ct. 1194, 10 LE2d 215, and other related cases, *Joe Z. v. Superior Court* (1970) 3 C3d 797, 91 CR 594, 478 P2d 26, *In re Ferguson*

(1971) 5 C3d 525, 96 CR 594, 487 P2d 1234, *People v. Hitch* (1974) 12C3d 641 and other pertinent cases.

Dated: March 4, 1981.

DEMEO & DEMEO
/s/ JOHN F. DEMEO

Attorney for Requesting
Defendant

People v. Trombetta

EXHIBIT "A"

1. Arrest Investigation Report;
2. Results of breath test given to determine alcoholic content in the blood of Defendant, including the read-out print documenting the results thereof;
3. Any and all breath samples of Defendant taken at or about the time the breath test was administered to Defendant at the Sonoma County Jail on January 31, 1981;
4. All test ampules containing breath samples of Defendant taken at or about the time the breath test was administered on Defendant at the Sonoma County Jail on January 31, 1981;
5. All simulator samples and solutions and compounds used to calibrate the subject intoxilyzer machine used by the County of Sonoma, on January 31, 1981;
6. All simulator samples and solutions and compounds used to calibrate the intoxilyzer machine used by

the County of Sonoma, on January 31, 1981, January 30, 1981, and January 29, 1981;

7. Any and all records, documents, correspondence, repair orders, and memorandum regarding the maintenance, repairs and calibration of the intoxilyzer machine used by the County of Sonoma to render the breath test to Defendant, for the period November 1, 1980, through January 31, 1981.

GENE L. TUNNEY, DISTRICT ATTORNEY

County of Sonoma

212J Hall of Justice

P.O. Box 1964

Santa Rosa, CA 95402

(707) 527-2311

JAMES T. LEE, Deputy

Attorney for The People

MUNICIPAL COURT OF THE STATE OF
CALIFORNIA, COUNTY OF SONOMA
COURT NO. 78532 TCR

D.A. NO. 40261

THE PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff,

vs.

ALBERT WALTER TROMBETTA,

Defendant(s).

POINTS AND AUTHORITIES IN OPPOSITION TO
DEFENDANT'S MOTION FOR DISCLOSURE AND
INSPECTION OF EVIDENCE.

(3/18/81 9:30 a.m. No.4)

(Filed March 13, 1981)

INTRODUCTION

All legally discoverable files, notes and memorandum within the District Attorney's files have been in the past, and are always now, open to the inspection of each defense counsel in this matter who has in fact declared himself to be the general counsel of said defendant. All items in physical evidence now in the possession or under the control of the District Attorney's Office are open for inspection during office hours and arranged as mutually convenient by the attorneys. Therefore, the People do not oppose discovery relative to requests made, except as stated herein.

The subjects of the defendant's requests No. 3 and No. 4 are nonexistent. When dealing with the Omicron Intoxilyzer, neither the breath samples nor test ampules are retrievable. Requests No. 5 and No. 6 should be limited to the available records of the County Crime Lab. Request No. 7 is unduly burdensome and should be limited to the available records, one week prior to the test and two weeks subsequent.

ARGUMENT

The defendant may not seek discovery indiscriminately. He must show that it is useful or relevant to his case. *Kelvin L. v. Superior Court* (1976) 62 Cal.App.3d 823; *Cadena v. Superior Court* (1978) 79 Cal.App.3d 212.

Here the subject matter which the defendant seeks is nonexistent in requests No. 3 and No. 4. The validity of the use of the Omicron Intoxilyzer and the inability to produce such samples was upheld in *People v. Miller* 52 Cal. App.3d 666.

The only element reducible to possession was the printout card, which has been preserved. The machine itself remains available. It and the frequent testings required by regulations of the Department of Health are available for discovery and possible impeachment . . . The intoxilyzer has been subjected to rigid scrutiny and testing by a state agency qualified in this technical field. It has been approved for use under the detailed regulations prescribed by that agency. Substantial numbers of the intoxilyzer have been purchased by the State Department of Justice and by many counties. *People v. Miller* (supra) at page 670.

Requests No. 5 and No. 6 are overly burdensome. The defendant seeks the actual samples, when the results of tests on these samples are readily available. The extent of a motion for discovery by a defendant rests in the sound discretion of the trial court, which may order discovery in the interests of justice. *Hill v. Superior Court* (1974) 10 Cal.3d 812. The People make available all records pertaining to the samples requested. There are actual test results concerning these samples. These tests measure the quality of the samples against their legal requirements. These are available; the defendant has shown no need for further testing!

Request No. 7 seeks production of an unreasonable long period of records. A three month period is far beyond the material necessary. The People now, as always, make available the maintenance and calibration records

for the period one week preceeding and two weeks subsequent to the subject test. Here again the People rely on the discretion of the trial court as stated in *Hill* (supra). The above-mentioned records are available as a matter of standard procedure. The defendant's request goes beyond a feasible limit.

The People request that the defendant's motion be limited to the standards recited herein.

DATED: March, 1981.

Respectfully submitted,

GENE L. TUNNEY,
DISTRICT ATTORNEY

/s/ James T. Lee

Deputy District Attorney

DEMEO & DEMEO

DeMeo Building, 1022 Mendocino Avenue
Santa Rosa, California 95401
(707) 545-3232
Attorneys for Defendant

MUNICIPAL COURT OF CALIFORNIA,
COUNTY OF SONOMA

No. 78532 TCR

PEOPLE OF THE STATE OF CALIFORNIA,
Plaintiffs,

vs.

ALBERT WALTER TROMBETTA,
Defendants.

NOTICE OF MOTION FOR SUPPRESSION AS EVIDENCE, MOTION IN LIMINE AND FOR PROTECTIVE ORDER, POINTS AND AUTHORITIES, SUPPORTING DECLARATIONS AND OFFER TO STIPULATE.

Date of Hearing: March 26, 1981

Time: 9:00 a.m., Department 3

(Filed March 23, 1981)

TO GENE L. TUNNEY, District Attorney of Sonoma County, State of California:

Please take notice that on March 26, 1981 at 9:30 o'clock a.m., or as soon thereafter as the matter can be heard, at the courtroom of Department No. 3 of the above entitled Court, at the Hall of Justice in the City of Santa Rosa, County of Sonoma, State of California, pursuant to Section 1538.5 of the Penal Code of the State of California and pursuant to all other provisions of law, defendant will, and does hereby, move the Court for an order directing that the test results of the Intoxilyzer breath test of defendant be suppressed as evidence against defendant in any further proceedings herein.

This motion is made on the grounds that:

1. The failure to provide the defendant with a testable sample of his breath is discriminatory and is a denial of due process of law in contravention of the *Fourth, Fifth and Fourteenth Amendments to the United States Constitution and Article I, Sections 7 and 13 of the California Constitution.*

2. That the failure to advise defendant that there would be no breath sample preserved as evidence and/or for retesting is discriminatory and is a denial of due pro-

cess of law in contravention of the *Fourth, Fifth and Fourteenth Amendments to the United States Constitution and Article I, Sections 7 and 13 of the California Constitution.*

3. That the failure to preserve the simulator samples and solutions and compounds used to calibrate the Intoxilyzer machine used by the County of Sonoma on January 31, 1981, before the defendant was administered the test, is discriminatory, and is a denial of due process of law in contravention of the *Fourth, Fifth and Fourteenth Amendments to the United States Constitution and Article I, Sections 7 and 13 of the California Constitution.*

This motion is based on this notice, the pleadings, records, and files in this proceeding, the attached memorandum of points and authorities, and the attached supporting declarations of ALBERT WALTER TROMBETTA and JERRY W. CURRY and any other oral or written evidence and declarations that may hereinafter be offered herein, and the Offer to Stipulate.

DATED: March 20, 1981.

DeMEO & DeMEO

/s/ JOHN F. DeMEO

Attorneys for Defendant

ALBERT WALTER

TROMBETTA

(Caption Omitted)

POINTS AND AUTHORITIES IN SUPPORT OF
MOTION TO SUPPRESS, MOTION IN LIMINE AND
FOR PROTECTIVE ORDER

INTRODUCTION

In this case, which charges defendant with a violation of a major misdemeanor with severe consequences if convicted, the people have conceded in a document entitled "Points and Authorities in Opposition to Defendant's Motion for Disclosure and Inspection of Evidence" filed on March 13, 1981, that they have *no breath samples of defendant nor do they have test ampoules containing samples of defendant's breath*, and apparently do not have simulator samples used to calibrate the Intoxilyzer machine, although defendant submitted to a breath test on his arrest on January 31, 1981. Defendant has no opportunity therefore to retest the prosecution's chemical analysis.

The gist of this Motion to Suppress, Motion in Limine and for Protective Order is, that since the legislature *requires* the preservation of *blood* and *urine* samples for retesting should the defendant request same, the failure to similarly require preservation of and/or the actual failure of law enforcement to preserve a *breath sample* for retesting is *discriminatory, denies equal protection of law and denies due process of law*, thereby denying a fair trial to a defendant, accused of driving while under the influence of intoxicating liquor in alleged violation of Section 23102 (a) of the Vehicle Code, *unless* the breath test results are suppressed.

Further, that the failure to advise a defedant who has chosen to take a breath test, before the test is ad-

ministered, that no breath test sample is being preserved for retesting, so as to allow him to either waive the preservation of a sample of his breath, or to allow him a true and informed choice of a blood or urine test in lieu of a breath test, is likewise discriminatory and denies such a defendant equal protection and due process of law unless the results of said test are suppressed.

THE WITHIN MOTION IS FOUNDED NOT ONLY ON PENAL CODE SECTION 1538.5 BUT ALSO SAID MOTION IS SANCTIONED BY THE COMMON LAW.

The very recent case of *People vs. Superior Court (Scott)* (1980) 112 C.A.3d 602, clearly sanctions a common law pre-trial motion to suppress. Thus, the moving party herein has several alternative bases for this motion, i.e. Penal Code Section 1538.5 and the common law suppression motion. In addition, Section 352 of the Evidence Code gives this honorable Court wide latitude in the exercise of discretion to exclude evidence.

TWO LANDMARK DECISIONS OF THE CALIFORNIA SUPREME COURT REQUIRE THE SUPPRESSION OF THE RESULTS OF THE BREATH TEST IN THIS CASE.

In *People vs. Hitch* (1974) 12 C.3d 641, the California Supreme Court held that where the test ampoule and reference ampoule and bubbler tube of a Breathalyzer test taken of the defendant in a case charging violation of Vehicle Code Section 23102(a), were discarded, the result of the test would be excluded from evidence. ". . . unless the prosecution can show that the governmental agencies involved have established, enforced and attempted in good

faith to adhere to rigorous and systematic procedures designed to preserve the test ampoule and its contents and the reference ampoule used in such chemical test. The prosecution shall bear the burden of demonstrating that such a duty to preserve the ampoules and their contents has been fulfilled." (at Page 652-653) (Emphasis supplied)

Hitch (supra) goes on to hold that a failure to meet that burden requires the results of the test to be excluded from evidence.

In the case at bar there was no effort, *no intention to collect, or any attempt to collect breath samples of defendant for preservation for retesting*, nor was there any effort to retain the simulator samples and/or solutions and compounds used to calibrate the subject Intoxilyzer machine used by the County of Sonoma on January 31, 1981 prior to testing this defendant on that same date. Also, no attempt or effort was made to advise defendant that no sample of his breath was being retained and thus as a result of these failures the spirit of *Hitch* (supra) has been violated and thereby dictates suppression of the test and its results.

The second of the landmark decisions by the California Supreme Court which compels suppression of the breath test results herein is *People vs. Nation*, (1980) 26 Cal.3d 169, which made the following rulings and clarifications of *Hitch* (supra):

1. "Yet it is well established that the suppression by the State of evidence favorable to an accused after a request therefor, violates due process, irrespective of the good faith of the prosecution *Brady vs. Maryland* (1963) 373 U.S. 83, 87, (10 L. Ed. 2d 215, 218, 83 S. Ct. 1194].)" At page 175.

2. "In *People vs. Hitch* (174) 12 Cal.3d 641, 650 [117 Cal. Rptr. 9, 527 P.2d 361], we held that the obligation to disclose the existence of material evidence places on the state a correlative duty to preserve such evidence *even without a request therefor*, and directed that in the future law enforcement agencies take reasonable measures to ensure its adequate preservation." (Emphasis supplied)

Foot Note 1. "The present case is typical of the problem covered by *Hitch*, in that defendant here was not charged at the time the police physician obtained the semen sample. *If a request were a condition to the duty to preserve, the duty might not arise until it became impossible of performance.*" At page 175. (Emphasis supplied)

3. "As in *Hitch*, we are not in a position to examine the suppressed evidence to decide whether or not it is material. However, evidence lost to the defense because of its destruction by the authorities *will be deemed material for the purpose of triggering the due process concerns of Hitch if there is a reasonable possibility that it would be favorable to the defendant on the issue of guilt or innocence.* (12 Cal.3d at P. 649.) Contrary to the prosecution's contention, the rationale of *Hitch* is thus not limited to circumstances in which the destroyed evidence proves a necessary element of the crime." At Page 176. (Emphasis supplied)

Nation (supra) imposes a duty to preserve any body fluid, body vapor, or other substance taken from a defendant, for retesting purposes, for the obvious reason that the preservation would admit of retesting by an accused defendant's own experts. The results of such retesting could be used to impeach the prosecutions witnesses and could possibly completely exonerate the defendant.

In the instant case the prosecution *took* the breath sample and although it could have inexpensively preserved

a sample for retesting, it did not do so and the defendant was not informed that no sample would be preserved and the defendant thereby lost any opportunity to counter the devastating evidence of the results of the breath test which under the Vehicle Code would give rise to a presumption of guilt of the charge of 23102(a), if the result of the test is at or exceeds a reading of .10 percent by weight of alcohol in the person's blood. The results of the tests in this case trigger the presumption of guilt. The results of the tests herein were .18, .19.

The failure to collect a sample of breath for retesting, makes it legally impossible for this defendant to *rebut* the presumption created by law that he was guilty. Yet, had defendant chosen a blood or urine test, the law *requires* the preservation of a sample for retesting. This is blatant discriminatory legislation on its face. There can be no reasonable or rational distinction between the blood, urine and breath tests, and why samples for retesting are required in two of the three tests available to a defendant, but not for the breath test.

The chemical analysis of any of the three tests gives rise to the same presumptions under Vehicle Code Section 23126 and therefore that which is fair as to two of the tests must apply to all to escape constitutional infirmity.

As will be seen by the evidence to be presented on this motion, the state of the art was, at the time of defendant's arrest, and had been for several years, that samples of a defendant's breath, taken at the time a blood alcohol breath test is given, *can be preserved and can be so preserved at a nominal cost*. In fact the cost of taking breath samples for retesting is less costly than is required to preserve urine or blood samples for retesting.

In fact, in this very county, prior to the advent of the State crime lab concept, certain law enforcement agencies had followed the procedure of collection of samples of breath for submission for testing by a private contractor lab and for retesting at the defendant's behest.

THE EVIDENCE WILL SHOW THAT THE STATE DEPARTMENT OF HEALTH SERVICES HAD APPROVED AN INEXPENSIVE, EASY TO OPERATE UNCOMPLICATED INSTRUMENT IN 1973 WHICH WAS AND IS DESIGNED FOR USE INDEPENDENTLY OF ANY OTHER MACHINE, FOR BREATH ALCOHOL COLLECTION AND ANALYSIS, WHICH MACHINE ALLOWED THE COLLECTION OF SAMPLES FOR LATER TESTING AND ANALYSIS.

Section 1221.3(c) of the Regulations relating to Forensic Alcohol Analysis and Breath Alcohol Analysis, contained in Title 17 of the California Administrative Code provides that only such instruments as have been approved by the California State Department of Health Services shall be used for breath alcohol analysis in this State.

As early as 1973 the California State Department of Health Services approved a device known as an "Intoximeter Field Crimper — Indium Tube Encapsulation Kit." The device allows the collection of breath samples for breath alcohol analysis at a later time than the time of collection.

This device was, is, and has been available at a reasonable cost for several years. It is simple to operate and would give a defendant the Constitutional right he or she may be entitled to, to wit: retesting.

There are other simple, inexpensive methods which would allow the taking of samples of a persons breath for later breath alcohol analysis which can be used in conjunction with the Intoxilyzer machine used by the County of Sonoma.

The evidence will amply illustrate that the samples collected by several available means can be tested at a subsequent time and that the results of the later tests are *reliable*.

THE PROSECUTION IN SONOMA COUNTY HAS
IN EFFECT "SUPPRESSED" MATERIAL EVIDENCE
BY ITS FAILURE TO PRESERVE
BREATH SAMPLES FOR LATER ANALYSIS.

It is axiomatic that samples of blood, breath, or urine, are material to the proof of drunk driving charges. As pointed out hereinabove certain presumptions arise at certain blood alcohol levels. (See Vehicle Code § 23126). The test results, if admissible, trigger certain presumptions relating to guilt.

When one looks at simple analogies it becomes obvious that the failure to preserve breath samples is tantamount to supression of evidence by law enforcement, which is, contrary to concepts of due process or as others have spoken of it, contrary to fair play

Take the following three examples:

1. Let us suppose that a bullet is removed from a murder victim, analyzed by the governmental crime lab for the purpose of connecting it up to the defendant's gun and then thrown away or destroyed before defendant can have it analyzed.

2. Suppose again that fingerprints found at a burglary scene are rolled and put on a card, analyzed and compared with defendants and after comparison the card is thrown away before the defendant has an opportunity to have them analyzed.

3. Suppose that a defendant is accused of murder by poison and the liquid is retrieved and analyzed and found by the prosecution to be poison and the substance is thrown away before allowing an analysis by the defendant.

In each of the above situations, one can readily say the defendant has been denied due process. *Hitch* (supra) and *Nation* (supra) tell us that there is something inherently unfair and wrong about the *non-preservation of material evidence*.

In the instant case, law enforcement has deliberately, consciously, and voluntarily chosen to conduct their own breath test on an Intoxilyzer, *knowing that it does not preserve the breath sample taken and in spite of this knowledge has made no effort, although easy and inexpensive to do so, to preserve breath samples for retesting*.

It is inherently wrong, unfair and patently and facially unconstitutional to allow the prosecution to use the *results* of a test performed on *body fluid* or vapor to trigger certain presumptions of guilt without the most basic of safeguards, viz. the preservation of a sample of that fluid or vapor for retesting by defendant to verify or refute the test results contended for by the prosecution.

The evidence will show in this case that the Intoxilyzer machine used by the prosecution to perform the breath test in this case *is far from foolproof*. It is woefully non-specific, i.e. reacts false positively to a number of sub-

stances which are not ethanol. The Intoxilyzer can also be inadvertently or advertently tampered with, and can be improperly calibrated, all of which shortcomings are the fundamental and basic reasons why the test results on such a machine must be suppressed in the absence of a retestable preserved breath sample.

THE HONORABLE JOSEPH R. LONGACRE, JR., JUDGE OF THE MUNICIPAL COURT OF CONTRA COSTA COUNTY HAS RULED THAT THE FAILURE TO PROVIDE THE DEFENDANT WITH A SAMPLE OF HIS BREATH FOR PURPOSES OF RETESTING AS IS DONE IN THE CASE OF BLOOD AND URINE, DISCRIMINATES AND DENIES THE DEFENDANT A FAIR TRIAL PREVENTING HIM FROM ENJOYING THE DUE PROCESS OF LAW HE IS GUARANTEED.

Although this Court is not bound by another Municipal Court Judge's decision, it is submitted that Judge Longacre's decision is what *Hitch* (supra) and *Nation* (supra) are all about.

A complete copy of Judge Longacre's decision is marked Exhibit "A" and is attached hereto for the convenience of the Court and counsel. It is patently clear that Judge Longacre's analysis of the problem presented herein is a sound one and his decision should be followed.

That another trial judge's opinion may be properly cited to a Court in an unrelated case for its persuasive value is axiomatic. See 6 *Within California Procedure* (1971) Section 659, 4574-4575.

THE SUPREME COURT OF COLORADO RELYING ON PEOPLE V. HITCH (SUPRA) HAS CORRECTLY RULED THAT IN ALL CASES WHERE

A DEFENDANT ELECTS TO SUBMIT TO A BREATH TEST TO DETERMINE HIS BLOOD ALCOHOL LEVEL, HE MUST BE GIVEN A SEPARATE SAMPLE OF HIS BREATH AT THE TIME OF THE TEST IF THAT TEST IS TO BE USED AS EVIDENCE.

In the case of *Garcia vs. The District Court* (1979) 589 P. 2d 924 the Colorado Supreme Court had before it the precise question posed in the instant case. Colorado has a statutory scheme identical to that in California, in that the same chemical tests are available to a defendant; the identical presumptions apply given certain levels of alcohol in the blood as analyzed by blood, urine or breath tests and the regulations pertinent to chemical analysis provided for preservation of blood and urine samples for the defendant but did not provide for preservation of breath samples.

In *Garcia* (supra) as here no breath sample was preserved and the simulator samples were unavailable. There, as here, there was no requirement to retain breath samples under Colorado State Board of Health Regulations, but there was such a requirement as to blood and urine.

The full text of the *Garcia* (supra) case is attached hereto marked Exhibit "B" and made a part hereof by reference.

Several holdings were made by the Colorado Court which it is respectfully submitted apply to this case. They are as follows:

1. "Preservation of the blood, urine, or breath which formed the basis for the conclusion that a person was operating a vehicle while under the influence of intoxica-

ting liquors is essential in view of the presumption that arises from the test." At Page 926;

2. "... procedures exist which permit the preservation of a Breathalyzer sample for use by the defense." At Page 926;

3. "The breath samples requested by the defendants are obviously material to the proof of the drunk driving charges." At Page 929;

4. "It is not necessary for a defendant to demonstrate that the evidence he seeks to discover, but which is no longer available for examination by the Court, would have been favorable to him, *People vs. Harmes* 38 Colo. App. 378, 560 P.2d 470 (1976), so long as that evidence is not merely 'incidental' to the prosecution's case or to the defendant's affirmative defense. *People vs. Bynum*, 192 Colo. 60, 556 P.2d 469 (1976). It is sufficient that the material requested 'might' be 'favorable' to the accused." *United States vs. Bryant*, 142 U.S. App. D.C. 132, 142 N. 21, 439 F.2d 642, 652 N. 21 (D.C. Cir. 1971)." At Page 929.

5. "The failure of the State to collect and preserve evidence, when those acts can be accomplished as a mere incident to a procedure routinely performed by State agents, is *tantamount to suppression of that evidence*. It is incumbent upon the State to employ regular procedures to preserve evidence which a State agent, in the regular performance of his duties, could reasonably foresee 'might be' 'favorable' to the accused." At Pages 929-930. (Emphasis supplied)

Basically, *Garcia* (supra) holds as does *Hitch* (supra) and *Nation* (supra).

In California, (like Colorado), *Vehicle Code Section 23126* imposes certain presumptions based upon chemical analysis of blood or urine or breath. *Absolutely no distinction is made as to the presumption which comes into play based upon the type of test taken by a defendant.*

California Vehicle Code Section 13353 gives the person arrested the absolute right to have a blood, breath or urine test and he is required to be advised of his choice by law enforcement.

The refusal to submit to a test results in a suspension of ones driver's license for a period of 6 months.

The very language of California Vehicle Code Section 13354 allows the person submitting to one of the three tests to have a retest. The obvious intent of the legislature is to have a sample available for retest, otherwise there can be no retest and the statute would be meaningless.

There can be no freedom of choice *unless the defendant is informed* that if he chooses the breath test, no sample will be preserved. He must be given the right to choose any of the tests that will preserve to him the right to retest. Otherwise, he has not given and informed consent nor has he had a free choice knowing all the facts, and in such case the results of the test must be suppressed in fairness. It can be properly argued that an unreasonable search and seizure has been made of defendant's person and body vapor when he was not properly informed and advised by law enforcement.

Title 17, Sections 1219 through 1219.3 only require blood and urine samples to be maintained for analysis by the defendant. Thus, a defendant choosing a breath test is *denied equal protection for no rational reason.*

Perhaps, at the time the Administrative Code Regulations were adopted, there was no approved method of collecting breath samples. Such has not however been the case since 1973 as pointed out at an earlier point in this memorandum.

THE DISCRIMINATORY LEGISLATION (I.E. STATE ACTION), FOUND IN TITLE 17 WHEREIN IT REQUIRES PRESERVATION OF BLOOD AND URINE BUT NOT BREATH IS A LAW SCHOOL CLASSIC EXAMPLE OF A VIOLATION OF EQUAL PROTECTION.

In *Reed vs. Reed* (1971) 404 U.S. 71, 92 S. Ct. 251, our United States Supreme Court said:

"The Equal Protection clause . . . den(ies) to states the power to legislate that different treatment be accorded to persons placed by a statute into different classes on the basis of criteria wholly unrelated to the objective of that statute. A classification 'must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike'" quoted in *Brown vs. Merlo* (1973) 8 C 3d 855, 861.

In applying *Reed* (supra) to the instant case, it is obvious that one group of individuals who choose a breath test as opposed to a blood or urine test, are given a *different treatment* as to their right to a body sample for retesting even though the body sample in question, (breath) is just as vital to the case as blood or urine samples and in spite of the fact that the breath can be *easily and inexpensively* preserved for retesting.

It is difficult to conceive how any sound thinking person can argue against the fact that a defendant taking a

breath test is denied equal protection where no sample is preserved.

It is neither reasonable nor consistent for law enforcement to ignore the fact that science has had an approved, reasonable, simple, inexpensive way to preserve breath samples for retesting, at least since 1973. Law enforcement cannot be allowed to defend their laxity in preserving breath samples on the basis that Title 17 "doesn't require it."

Vehicle Code Section 13354(c) which provides that:

"Upon the request of the person tested full information concerning the test taken at the direction of the peace officer shall be made available to him or his attorney", can be read to override Title 17.

This section certainly can be read to intend that "full" information including breath samples be made available to a defendant. Otherwise, the section has little or no meaning.

PEOPLE VS. MILLER IS INAPPLICABLE TO THE ISSUES IN THIS CASE BY ITS OWN LANGUAGE.

The prosecution will undoubtedly argue that *People vs. Miller* (1975) 52 Cal. App.3d 666, upholds the use of the Intoxilyzer machine notwithstanding that it does not collect breath samples for retesting.

It must be pointed out to the Court that *Miller* (supra), by the very language in the decision, does not reach the issues of this case and of course, does not and cannot overrule *Hitch* (supra).

In *Miller* (supra) the Court said at Page 670:

"In view of our determination of the basic issue, we do not elucidate the obvious point that *Hitch*, by its express terms, applies only to tests of breath administered after its filing, October 21, 1974. All the tests in the three cases before us were conducted before that date."

THE CONSEQUENCES OF A CONVICTION OF DRUNK DRIVING ARE EXTREMELY SERIOUS.

Drunk driving is a major misdemeanor. The consequences of conviction are potentially horrendous. Especially is this true where a prior is pleaded and proved. In addition to fines, jail sentences may be imposed as can driver's license suspensions. Second convictions within five years requires at least 48 hours jail time and could result in a 1 year jail term, and up to \$1,000.00 in fines and a mandatory 1 year license suspension. Greater consequences flow from additional convictions.

Additional consequences flow from a drunk driving conviction, such as higher insurance premiums and difficulty in obtaining insurance.

As Judge Longacre stated in his opinion:

"This Court wants it understood that it is not condoning leniency to the drunk driver, but it is insisting that every accused drunk driver who is being exposed to the *drastic consequences of a conviction* be afforded reasonable opportunity to employ a non-discriminatory defense in his behalf. As Justice Mosk indicated in the *Nation* decision, the integrity of our entire judicial system is dramatically involved." (Emphasis supplied)

This is not a case wherein the Court is being asked to dismiss the case at this time. The prosecution may pro-

ceed with their case sans the test results if it chooses to do so subject to proper challenge.

This is a case where the Court must suppress the evidence based on constitutional standards which invoke fair play. This is not a case which admits of technical or fine distinctions. It is clear under the law that the test results must be suppressed.

DATED: March 20, 1981.

Respectfully submitted,
DeMEO & DeMEO
/s/ John F. DeMeo
Attorneys for Defendant

(Caption Omitted)

DECLARATION OF
ALBERT WALTER TROMBETTA
IN SUPPORT OF MOTION

I, ALBERT WALTER TROMBETTA, declare:

1. I am the defendant in the above entitled proceeding;

2. That on or about January 31, 1981 I resided at 4741 Bridle Trail Drive, Santa Rosa, California;

3. On or about January 31, 1981 I was arrested by an Officer of the California Highway Patrol for an alleged violation of California Vehicle Code Section 23102(a);

4. On January 31, 1981, at the Sonoma County Jail, I was administered a breath test on an intoxilyzer machine. No other type of chemical test was administered to me on January 31, 1981 by the California Highway Patrol, or any other law enforcement agency;

5. At no time on January 31, 1981 did any law enforcement officer, or any other person advise me that there would be no sample of my breath preserved.

6. At no time on January 31, 1981, did any law enforcement officer or any other person advise me that no means had been provided by the California Highway Patrol, County of Sonoma, or any other law enforcement agency in this county, for the preservation of a sample of breath.

7. At no time on January 31, 1981, did any law enforcement officer or any other person advise me prior or after the taking of the breath test on the intoxilyzer machine, that there would be no sample of my breath retained for retesting;

8. I would not have submitted to the breath test on the intoxilyzer machine had I been informed that no sample of my breath would be obtained or preserved for retesting;

9. Had I been informed that no sample of my breath would be obtained or preserved for retesting, I would have requested a blood or urine test so that I could have obtained a sample thereof for retesting by an expert of my own choice.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on March 20, 1981, at Santa Rose, California.

/s/ ALBERT WALTER
TROMBETTA

(Caption Omitted)

OFFER OF DEFENDANT TO STIPULATE

Defendant ALBERT WALTER TROMBETTA, by and through his attorneys DeMEO & DeMEO, offers to stipulate to any or all of the hereinbelow:

1. That ALBERT WALTER TROMBETTA in connection with his arrest was administered a breath test on January 31, 1981 on an Intoxilyzer machine, Model No. 4011AW at the Sonoma County Jail, Santa Rosa, California;

2. That at no time on January 31, 1981, either or before or after said breath test was administered to ALBERT WALTER TROMBETTA did any law enforcement or peace officer advise ALBERT WALTER TROMBETTA verbally or in writing that there would be no sample of his breath preserved for retesting or for any purpose;

3. That on January 31, 1981, and for a period of at least 3 years prior to January 31, 1981, no law enforcement agency within the County of Sonoma provided any means for the preservation of a sample of breath for retesting of breath samples of individuals submitting to Intoxilyzer tests at the Sonoma County Jail, in conjunction with arrests for suspicion of driving a vehicle under the influence of alcoholic beverages.

4. That on January 31, 1981, and prior to the submission by ALBERT WALTER TROMBETTA to a breath test at the Sonoma County Jail, certain law enforcement officers recommended and suggested to ALBERT WALTER TROMBETTA that take the breath test as the choice of tests available to him to determine the alcoholic content in his blood.

5. That on January 31, 1981, and for a period of at least 7 years prior thereto, there was and is available a device for the capturing and preservation of breath samples which samples may be accurately tested within a reasonable time thereafter for alcoholic content of the blood of the donor of the sample.

6. That prior to the time that the California Department of Justice Bureau of Forensic Services was delegated the task of testing and/or interpreting the results of breath tests on the Intoxilyzer machine located at the Sonoma County Jail, a private firm performed the testing and/or interpretation of said tests and that certain law enforcement agencies with law enforcement jurisdiction within the County of Sonoma submitted breath samples to said private contractor laboratory in tubes for analysis and that sufficient samples were forwarded to said laboratory so as to allow a defendant an opportunity for independent retesting of the breath sample on request.

7. That none of the simulator samples, solutions or compounds or any part of said samples, solutions or compounds used to calibrate the Intoxilyzer machine prior to the testing of ALBERT WALTER TROMBETTA have been retained by the People or any law enforcement agency.

8. That on January 31, 1981, those persons who chose a breath test in the County of Sonoma by any machine device operated by law enforcement officers in said county, were not provided with nor was there available to such persons, a sample of breath to be used for retesting.

9. That on January 31, 1981, and for a period of at least three years prior thereto, at least 80% of all chemical

tests submitted to by any driver suspected of being under the influence of intoxicating liquor, is and was the breath test.

10. That the law of the State of California in Vehicle Code Section 23126 makes no distinction among the breath, blood or urine test as it relates to the presumption and burden of proof in connection therewith.

11. That the law of the State of California on January 31, 1981 was and now is that the failure to preserve samples of blood or urine taken of a defendant suspected of driving a vehicle under the influence of intoxicating liquor, requires the suppression of the results of the test on a proper motion made to the Court.

12. Subject to all appropriate appellate review, a ruling by the Court herein will be binding on the People at Trial.

Any or all of the above stipulations are offered on the hearing of this motion or at trial in the interest of preserving the time of the Court and counsel.

DATED: March 20, 1981.

DeMEO & DeMEO
/s/ JOHN F. DeMEO
Attorneys for Defendant

DEMEO & DEMEO

DeMeo Building - 1022 Mendocino Avenue
Santa Rosa, California 95401
(707) 545-3232

Attorneys for Defendant

MUNICIPAL COURT OF CALIFORNIA,
COUNTY OF SONOMA

No. 78532 TCR

PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiffs,

vs.

ALBERT WALTER TROMBETTA,

Defendants.

DECLARATION OF JERRY W. CURRY

(Filed March 23, 1981)

I, JERRY W. CURRY, declare as follows:

1. My name is JERRY W. CURRY and my business address is 1041 4th Street, Santa Rosa, California;

2. I have a B.A. degree from San Jose State University in Medical Technology, Chemistry and Microbiology. My year of graduation from San Jose State University was 1961;

3. I am a Forensic Alcohol Supervisor duly qualified as such by the State of California to perform Forensic

Alcohol Analysis. I have been so qualified since December 21, 1970.

4. I have been associated with Central Pathology Laboratory, whose present address is 1041 4th Street, Santa Rosa, California, since June 1, 1969.

5. I am an officer, stockholder, and a member of the Board of Directors of Central Pathology Laboratory, a California corporation engaged in the science of, among other scientific studies, forensic alcohol analysis from human blood, urine and breath.

6. I am the lab manager of Central Pathology Laboratory.

7. I have personally performed forensic alcohol analysis in conjunction with my association with Central Pathology Laboratory, on human samples of blood, urine, and breath and have personally tested and analyzed well over 1,000 samples of blood, well over 1,000 samples of urine and well over 1,000 samples of breath from different humans for alcohol analysis.

8. From approximately 1970 to some date in 1975, Central Pathology Laboratory performed blood, urine and breath alcohol analysis on behalf of the District Attorneys office of the County of Sonoma in conjunction with said District Attorney's criminal law enforcement duties, which analyses were primarily involved with individuals suspected of driving motor vehicles while under the influence of alcoholic beverages in violation of the laws of the State of California.

9. From 1972 to a date in 1975, law enforcement agencies in Sonoma County, such as the Sheriff's Office,

California Highway Patrol and various City Police groups, used a scientific instrument known as an "Intoximeter Field Crimper-Indium Tube Encapsulation Kit" for the purpose of collecting breath samples in the field, of persons suspected of driving a vehicle under the influence of intoxicating beverages, where those persons requested a breath test. Various police stations throughout Sonoma County also had these instruments on hand at their various stations for collection of breath samples. The above described Intoximeter Field Crimper is designed as a capturing device for entrapment of alcohol in a breath sample for *later analysis*.

It is capable of being used in a stationary location or in a vehicle and the device operates by plugging it into a 110 volts receptacle or a cigarette lighter receptacle in a motor vehicle. The device and accompanying kit is simple to use and requires very little room to house same. No scientific background or knowledge is required to operate the device or capture breath samples.

10. The "Intoximeter Field Crimper-Indium Tube Encapsulation Kit" has been approved for use in California for use in breath alcohol analysis since *August 8, 1973*.

11. The Intoximeter Field Crimper referred to in this declaration and as is approved by the State of California, is designed to collect 3 samples of breath, *each of which may be separately analyzed at a time later than the moment of collection thereof*.

12. Between 1972 and a date in 1975, law enforcement personnel in Sonoma County who had collected breath samples with the Intoximeter Field Crimper would submit three samples of breath from each suspect in

Indium Tubes to Central Pathology Laboratory. The laboratory would in turn routinely analyze two of the three samples and retain the third sample intact for re-testing by the suspect, should a request for same be made by the suspect.

13. At all times mentioned herein, including the present date, Central Pathology Laboratory owned and utilized a "Gas Chromatograph Intoximeter Mark II". This instrument was approved by the State of California for Breath Alcohol Analysis in 1971 and to this day said instrument continues to be so approved. This instrument allows the *immediate* analysis of breath samples collected by direct expiration by the subject into the instrument in which the measurement of alcohol concentration is performed and it also permits later analysis of breath samples which are collected with an Intoximeter Field Crimper-Indian Tube Encapsulation Kit. Both methods of breath alcohol analysis, i.e. the immediate analysis by direct expiration into the instrument and the *later analysis* from collected samples have been authorized in California for several years.

14. To my personal knowledge, breath alcohol analysis results from collected samples of breath using the aforesaid Intoximeter Field Crimper, have been admissible in Court as evidence in cases involving persons suspected of driving motor vehicles while under the influence of intoxicating liquor.

15. To my knowledge, the aforesaid Intoximeter Field Crimper-Indium Tube Encapsulation Kits are and have been readily available for purchase and use.

16. The Gas Chromatograph Intoximeter Mark II instrument is available for use in the Central Pathology

Laboratory at this time and will continue to be available for use in conducting breath alcohol analysis on a scientific reliable basis.

17. It is my considered opinion that breath samples which are properly collected with the Intoximeter Field Crimper-Indium Tube Encapsulation Kit may be readily and accurately tested and analyzed for alcohol content. Tests and experiments I have personally performed have indicated that a retained breath sample in an indium tube may be scientifically and reliably tested for up to 3 months after the collection of the breath sample.

18. An approved method of collecting breath samples for later analysis for alcohol content has existed since August of 1973. It is my opinion that law enforcement personnel in Sonoma County have had the capability of capturing and retaining said breath samples for the past several years had they desired to do so. The Intoximeter Field Crimper-Indium Tube Encapsulation Kit may be used separate and apart from any other instrument for the breath collection process and does not depend upon any other instrument for the collection of the breath sample.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on March 20, 1981, at Santa Rosa, California.

/s/ Jerry W. Curry

JUDGE LAWRENCE G. ANTOLINI
Municipal Court - Department Three
Hall of Justice
600 Administration Drive
Santa Rosa, CA 95401
Telephone: (707) 527-2571

NO. 78532 TCR
NO. 78402 TCR

MUNICIPAL COURT FOR THE
COUNTY OF SONOMA
STATE OF CALIFORNIA

THE PEOPLE OF THE STATE
OF CALIFORNIA,

Plaintiff,

vs.

MELINDA PIERSON BERTRAM,
ALBERT WALTER TROMBETTA,

Defendants.

RULING ON 1538.5 and OTHER MOTIONS

The court hereby denies the 1538.5 and stipulated 402 motion in the above-entitled cases. The court's decision is based upon the evidence and testimony admitted before it and also based upon the briefs and all cases cited by both the people and the defense. I therefore will not be reiterating all the above mentioned arguments and cases. I will comment, however, upon the most prevalent of the many issues presented. The first of these is a factual as well as a legal issue that must be addressed namely

whether or not the breath sample "collected" comes under the auspices of the Hitch and Nation mandates. The art of semantics for many years has been the subject matter of courses taught at many of the outstanding universities in the world. Indeed then, the interpretation and or interpolation of words can only be considered to be accurate, when taken in the light of all the surrounding circumstances of a particular situation. The verb "collect" or "gather together" may be either of a temporary or permanent nature. It appears to this court that from the testimony elicited and from the evidence submitted, that at best a state when using the 4011-W Intoxilizer unit, *temporarily* collects or gathers breath of a tested individual. The chamber which collects this breath contains it only for a period of time necessary to conduct an analysis on this breath. By the construction of the machine itself, namely that of having two or[i]ffices, one for introduction and one for the expulsion of the sample, it appears to the court that the temporary control over the breath makes the ultimate dissipation and destruction of the sample an inherent and obvious consequence of using that particular intoxilizer unit. The argument that the state is in control of the breath and that by choosing to purge the sample, destroys it, is an argument that in the court's opinion is reductio ad absurdum. Mr. Murray, the defense witness, stated in substance, that the intoxilizer collects breath but not for later analysis and then must be purged in order to be usable again. Without an addition to the present intoxilizer unit it appears to the court that it would be impossible to exercise permanent control resulting in preservation of any sample. Therefore, it would appear to the court that the destruction of any temporar-

ily collected sample would not be through the actions or efforts of the state, but rather through the workings of the machine itself. Therefore, the court finds the cases of the Hitch and Nation are not violated where the state uses the above-described intoxilizer unit in that the state never had permanent possession of the sample, therefore had no election to make since on that unit permanent retention is impossible without modifications. The above referred to intoxilizer unit was approved by the State of California in 1973; further there have been improvements upon the basic unit until the present AW series. The court finds that the intent of the Legislature is therefore to accept the machine as it exists without any attachments which would permanently preserve the temporarily collected samples of breath, since these attachments have been available and yet there has not been withdrawal or qualification of the state approval of the intoxilizer.

Addressing now the question of whether the defendant has the right to be advised that if she takes the breath tests as presently given in Sonoma County, that she will not have a sample preserved. The court find that § 13353 of the Vehicle Code and subsequent sections are not constitutionally guaranteed, rather they are administrative policy with the immediate purpose to obtain the best evidence of the blood alcohol content of a person believed to be driving while under the influence of an alcoholic beverage. Further, the purpose of the above sections are to avoid the possible violence which could erupt if forcible tests were made upon a recalcitrant and belligerent inebriate in order to obtain the best evidence.

§ 1219.3 of Article 5, Title 17 CAC does not provide for a breath sample although 1219.1 and 1219.2 provide for the retention of blood and urine samples respectively. It has been argued by the defense that at the time of the regulations it was not possible to retain the breath. It appears to this court that in the time that has passed, the Legislature has had more than ample opportunity to amend this particular area of the law and yet the Legislature has knowingly nad purposefully chosen not to mandate the retention of breath samples.

In summary the court then finds that the state in this case did not possess the breath sample in the sense and or context of the Hitch and Nation decisions and further that there is no constitutional requirement that defendant be advised of the fact that only two of the three tests have samples that are statutorily required to be preserved.

DATED: May 7th, 1981.

LAWRENCE G. ANTOLINI,
Judge of the Municipal Court

DEMEO & DEMEO

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(707) 545-3232

Attorneys for Defendant & Appellant

MUNICIPAL COURT OF CALIFORNIA,
COUNTY OF SONOMA

No. 78532 TCR

PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff,

vs.

ALBERT WALTER TROMBETTA,

Defendant.

STATEMENT ON APPEAL

(Filed June 11, 1981)

NOTICE IS HEREBY GIVEN BY APPELLANT ALBERT WALTER TROMBETTA that he intends to file a reporter's transcript herein of the evidence and proceedings in the above entitled case and does hereby make the said reporter's transcript a part of his statement on appeal.

GROUND'S OF APPEAL

1. The failure to collect and preserve a retestable breath sample of a defendant arrested for driving a vehicle in alleged violation of the California Vehicle Code Section 23102(a), after said defendant has chosen to take a breath test, is discriminatory, violates equal protection, and is a denial of due process in contravention of the Fourth, Fifth and Fourteenth Amendments to the United States Constitution and Article I, Sections 7 and 13 of the California Constitution and such failure to collect and preserve said breath sample renders the results of said

breath test taken by the People subject to a suppression order and renders the results of said test inadmissible in evidence on the trial of such defendant.

2. The discriminatory legislation found in Title 17 of the Administrative Code wherein said code requires the preservation of blood and urine samples taken from a defendant, who has been arrested for driving a vehicle in alleged violation of the California Vehicle Code Section 23102(a), for the purpose of retesting, but does not require the preservation of a breath sample for retesting, is a violation of equal protection in contravention of the United States and California Constitutions, and renders the results of a breath test taken by the People subject to a suppression order and renders the results of said test taken by the People inadmissible in evidence on the trial of such defendant.

3. The failure to advise a defendant who has been arrested for driving a vehicle in alleged violation of California Vehicle Code Section 23102(a), after said defendant has chosen to take a breath test, but before said breath test is administered, that no breath sample is being preserved for retesting, so as to allow him the right to waive the preservation of a retestable sample of his breath, or to allow him a true and informed choice of a blood or urine test where retestable samples are preserved, is discriminatory; violates the equal protection clause and the due process clause of the United States and California Constitutions and renders the results of a breath test taken by the People subject to a suppression order and renders the results of said test inadmissible in evidence on the trial of such defendant.

4. All other grounds urged in the Court below in the moving papers filed therein and in the argument to

the Court found in the reporter's transcript are also urged on this appeal.

DATED: June 11, 1981.

Respectfully submitted,

DEMEO & DEMEO

/s/ John F. DeMeo

Attorneys for

Defendant and Appellant

Albert Walter Trombetta

PROOF OF SERVICE BY MAIL

(C.C.P. Secs. 1013(a), 2015.5)

I, the undersigned, say:

I am and was at the time of the within described mailing, over 18 years of age and employed in the County of Sonoma, California, in which the within referred mailing occurred. I am not a party to the cause or matter mentioned in the attached document.

My business address is 1022 Mendocino Avenue, Santa Rosa, California 95401.

I served the attached (full title of document)

STATEMENT ON APPEAL

by placing a copy thereof in an envelope or a copy of each in separate envelopes if more than one addressee is hereafter named, addressed to each addressee respectively at his office address, as follows:

Gene L. Tunney
District Attorney

County of Sonoma
2555 Mendocino Ave., Room 212J
Santa Rosa, California 95401

Each envelope so addressed and containing such copy was then sealed and postage thereon fully prepaid, and thereafter on the date and at the place this declaration was executed, shown below, deposited by me in a mail reception facility regularly maintained by the United States Postal Service.

Each copy of said document so served was accompanied by an unsigned copy of this proof of service made under declaration of perjury:

I declare under penalty of perjury that the foregoing is true and correct.

Executed on June 11, 1981, at Santa Rosa, California.

/s/ L. Diane Goree

DIVISION FOUR
SUPERIOR COURT OF CALIFORNIA,
COUNTY OF SONOMA
APPELLATE DEPARTMENT

No. 209-C A016374

PEOPLE OF THE
STATE OF CALIFORNIA,

Plaintiff/Respondent

vs.

ALBERT WALTER TROMBETTA,

Defendant/Appellant

DECISION

(Filed January 20, 1982)

Appellant's principal contention is that failure of the breath testing device, the Intoxilyzer, to preserve a retestable breath sample constitutes a denial of due process rendering the test results inadmissible. We conclude that this issue was decided in *People v. Miller* (1975) 52 Cal.App.3d 666, which held to the contrary. In so holding, the *Miller* court expressly rejected the contention that the duty to retain evidence once possessed, see *People v. Hitch*, 12 Cal.3d 641, should be extended to require that all evidence which can be reduced to preservable form by any means must be so transformed and retained. *Miller* 52 Cal.App.3d at 670.

We are aware that the record herein contains a number of factual matters which do not appear to have been involved in *Miller*. Specifically, it was stipulated that at the time of the collection of the breath sample on the Intoxilyzer, there was available to law enforcement authorities a device which has been approved by the Department of Health of the State for the collection of a breath sample for later testing, the Intoximeter Field Crimper-Iridium Tube Encapsulation Kit; that that device is financially feasible for the State to use and is simple to operate, and that it can be used at any place or location, such as a police station or in the field. There is also evidence in the record to the effect that there is an exist-

ing, practical technique usable with the Intoxylizer for the preservation of breath samples, the "Silica Gel method," currently in use in the State of Colorado. Be that as it may, it remains our conclusion that we are bound by the holding of *Miller*.

Petitioner next contends that the requirement under Title 17 of the Administrative Code that blood and urine samples be preserved for retesting, but not breath samples, constitute a violation of equal protection in contravention of the United States and California Constitutions. It is axiomatic that unless a classification involves a suspect classification such as one based on race, or one which infringes on a fundamental interest such as right to vote or pursue a lawful occupation, it will be upheld if it bears a rational relationship to a legitimate state purpose. See *Weber v. City Council*' (1973) 9 Cal.3d 950, 958-959. The classification involved here, assuming one exists, is clearly not suspect nor does it infringe on a fundamental interest. Therefore, the State need only show that it bears a rational relationship to a legitimate state purpose. The State has determined that given an opportunity to later test the accuracy of the Intoxylizer, and given the rigorous standards for maintenance and operation of the device, no sample need be preserved. Under the rational relationship test, the State's determination must be respected.

Lastly, appellant contends that failure to advise a defendant arrested for drunk driving that no breath sample will be preserved for retesting constitutes a denial of equal protection and/or due process. Since, under *People v. Branon* (1973) 32 Cal.App.3d 971, failure to admonish

a defendant of his choice of tests is not of constitutional proportion regarding exclusion of the results, we cannot say that failure to advise him that a particular test does not require preservation of the sample is of constitutional proportion.

The order denying motion to suppress is affirmed.
Dated: January 19, 1982

/s/ R. H. SIG,
Judge

WE CONCUR:

/s/ WILLIAM B. SOOSE
Judge

/s/ JOHN J. GOTHE,
Judge

DIVISION FOUR

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF SONOMA

APPELLATE DEPARTMENT

No. 209-C A016358

PEOPLE OF THE STATE OF CALIFORNIA,
Plaintiff/Respondent,
vs.

ALBERT WALTER TROMBETTA,
Defendant/Appellant.

ORDER DENYING REHEARING AND CERTIFYING
FOR TRANSFER TO COURT OF APPEAL

(Filed February 17, 1982)

The Petition for Rehearing is denied.

It is hereby certified that transfer of the herein case to the Court of Appeal appears necessary to settle an important question of law, namely, whether the holding in *People v. Miller* (1975) 532 Cal.App.3d 666, that failure to preserve a retestable breath sample does not render Intoxilyzer breath test results inadmissible, applies to a fact situation in which at the time of testing the breath sample on the Intoxilyzer, there was available to law enforcement authorities a device which would have preserved a breath sample for later testing, the Intoximeter Field Crimper-Indium Tube Encapsulation Kit, which had been approved by the Department of Health and stipulated to be financially and practicably feasible for the State to operate.

The Appellate Department of the Superior Court on January 20, 1982, affirmed an order of the Municipal Court denying defendant's motion to suppress. The basis of the Appellate Department's decision was that it was bound by the holding of *People v. Miller, supra*, and dicta contained therein.

Dated: February 16, 1982

/s/ RAY N. L.D.,
Judge of the Superior Court

/s/ WILLIAM B. BAER,
Judge of the Superior Court

/s/ JOHN W. GOTHE,
Judge of the Superior Court

COURT OF APPEAL OF THE STATE
OF CALIFORNIA
in and for the
FIRST APPELLATE DISTRICT
Division Four

No. A016358

Sonoma

Superior Court No. 209-C

(Filed March 24, 1982)

People of the State of California,
Plaintiff and Respondent,

vs.

Albert Walter Trombetta,
Defendant and Appellant.

BY THE COURT:

The Appellate Department of the Superior Court of the State of California in and for the County of Sonoma having certified that a transfer of the appeal in the above entitled action to the Court of Appeal appears necessary to secure uniformity of decision and to settle an important question of law, and good cause appearing therefore, the appeal from the Municipal Court in and for Sonoma County now pending in said superior court and numbered 209-C therein, is hereby transferred to the Court of Appeal, First Appellate District, Division Four.

The appeal will be calendared for oral argument when ordered on calendar.

/s/ Caldecott P.J.

Dated March 24, 1982

Thomas R. Kenney, Esq.
MURPHY, BROWNSCOMBE, KEEGAN & KENNY
200 E St., P. O. Box 1896
Santa Rosa, CA 95402
Telephone: (707) 545-5040
Attorneys for Defendant

MUNICIPAL COURT OF CALIFORNIA,
COUNTY OF SONOMA

No. 77262

PEOPLE OF THE STATE OF CALIFORNIA,

vs.

MICHAEL GENE COX,
Defendant.

NOTICE OF MOTION AND MOTION TO SUPPRESS
EVIDENCE, FOR PROTECTIVE ORDER, POINTS
AND AUTHORITIES AND DECLARATION IN SUP-
PORT THEREOF

(Filed April 8, 1981)

Hearing date: 4/13/81
9:00 A.M., Dept. #3

TO GENE L. TUNNEY, District Attorney of Sonoma
County, State of California:

WHEREAS, the above entitled Court having hereto-
fore scheduled this cause on April 13, 1981 in Department
#3 of the above entitled court for hearing at 9:00 A.M. for
pretrial motions, you are hereby given notice that at said

time and place defendant will move pursuant to 1538.5 of the Penal Code and other applicable provisions of law for an order of this Court directing that the breath test results of defendant COX be suppressed as evidence against said defendant in any further proceedings herein, and that further, the Court issue a protective order preventing any reference to said test during the course of the trial; these motions are made on the grounds, inter alia, that:

1. The failure to provide the defendant with a testable sample of his breath is discriminatory and is a denial of due process of law in contravention of the Fourth, Fifth and Fourteenth Amendments to the United States Constitution and Article I, Sections 7 and 13, of the California Constitution.

2. That the failure to advise defendant that there would be results of the test are suppressed. Defendants who choose the breath test or who are directed to take the same by the arresting officer, are not afforded the same opportunity as those who choose urine or blood.

At least a defendant should be informed of such discriminatory practice and given the opportunity to waive such discrepancy in the testing procedure.

II. NATION AND HITCH REQUIRE THE SUPPRESSION OF THE RESULTS OF THE BREATH TEST:

In *People vs. Hitch* (1974) 12 C 3d 641, the California Supreme Court held that where the test ampoule and reference ampoule and bubbler tube of a Breathalyzer test taken of the defendant in a case charging violation of Ve-

hicle Code Section 23102(a), were discarded, the result of the test would be excluded from evidence. "*... unless the prosecution can show that the governmental agencies involved have established, enforced and attempted in good faith to adhere to rigorous and systematic procedures designed to preserve the test ampoule and its contents and the reference ampoule used in such chemical test. The prosecution shall bear the burden of demonstrating that such a duty to preserve the ampoules and their contents has been fulfilled.*" (At Page 652-653) (Emphasis supplied)

Hitch (supra) goes on to hold that a failure to meet that burden *requires* the results of the test to be excluded from evidence.

In the case at bar there was *no effort, no intention to collect, or any attempt to collect breath samples of defendant for preservation for retesting*, nor was there any effort to retain the simulator samples and/or solutions and compounds used to calibrate the subject Intoxilyzer machine used by the County of Sonoma on December 12, 1930, prior to testing this defendant on that same date. Also, no attempt or effort was made to advise defendant that no sample of his breath was being retained and thus as a result of these failures the spirit of *Hitch* (supra) has been violated and thereby dictates suppression of the test and its results.

The second of the landmark decisions by the California Supreme Court which compels suppression of the breath test results herein is *People vs. Nation* (1980) 26 C 3d 169, which made the following rulings and clarifications of *Hitch* (supra):

1. "Yet it is well established that the suppression by the State of evidence favorable to an accused after a request therefor, violates due process, irrespective of the good faith of the prosecution *Brady v. Maryland* (1963) 373 U.S. 83, 87, (10 L. Ed. 2d 215, 218, 83 S.Ct. 1194)." At page 175.

2. "In *People v. Hitch* (1974) 12 C 3d 641, 650; 117 C R 9, 527 P. 2d 361, we held that the obligation to disclose the existence of material evidence places on the state a correlative duty to preserve such evidence *even without a request therefor*, and directed that in the future law enforcement agencies take reasonable measures to ensure its adequate preservation." (Emphasis supplied)

Foot Note 1. "The present case is typical of the problem covered by *Hitch*, in that defendant here was not charged at the time the police physician obtained the semen sample. *If a request were a condition to the duty to preserve, the duty might not arise until it became impossible of performance.*" At page 175. (Emphasis supplied)

3. "As in *Hitch*, we are not in a position to examine the suppressed evidence to decide whether or not it is material. However, evidence lost to the destruction by the authorities *will be deemed material for the purpose of triggering the due process concerns of Hitch if there is a reasonable possibility that it would be favorable to the defendant on the issue of guilt or innocence.* (12 Cal. 3d at P. 649) Contrary to the prosecution's contention, the rationale of *Hitch* is thus not limited to circumstances in which the destroyed evidence proves a necessary element of the crime." At Page 176. (Emphasis supplied)

Nation (supra) imposes a *duty* to preserve any body fluid or body vapor, or other substance taken from a defendant, for retesting purposes, for the obvious reason that the preservation would admit of retesting by an ac-

cused defendant's own experts. The results of such retesting could be used to impeach the prosecution's witnesses and could possibly completely exonerate the defendant.

In the instant case the prosecution *took* the breath sample and although it *could have* inexpensively preserved a sample for retesting, it did not do so and the defendant was not informed that no sample would be preserved and the defendant thereby lost any opportunity to counter the devastating evidence of the results of the breath test which under the Vehicle Code would give rise to a presumption of guilt of the charge of 23102(a), if the result of the test is at or exceeds a reading of .10 percent by weight of alcohol in the person's blood. The results of the test in this case trigger the presumption of guilt. The result of the test herein was .20.

The failure to collect a sample of breath for retesting, makes it legally impossible for this defendant to *rebut* the presumption created by law that he was guilty. Yet, had defendant chosen a blood or urine test, the law *requires* the preservation of a sample for retesting. This is blatant discriminatory legislation on its face. There can be no reasonable or rational distinction between the blood, urine and breath tests, and why samples for retesting are required in two of the three tests available to a defendant, but not for the breath test.

The chemical analysis of any of the three tests gives rise to the same presumptions under Vehicle Code Section 23126 and therefore that which is fair as to two of the tests must apply to all.

As will be seen by the evidence to be presented on this motion, the state of the art, was at the time of defendant's

arrest, and had been for several years, that samples of a defendant's breath, taken at the time a blood alcohol breath test is given, *can be preserved and can be so preserved at a nominal cost*. In fact, the cost of taking breath samples for retesting is less costly than is required to preserve urine or blood samples for retesting.

In fact, in this very county, prior to the advent of the State crime lab concept, certain law enforcement agencies had followed the procedure of collection of samples of breath for submission for testing by a private contractor lab and for retesting at the defendant's behest.

III. THERE IS STATE APPROVED AND SCIENTIFICALLY ACCEPTED BREATH TESTING EQUIPMENT THAT CAN BE INEXPENSIVELY USED TO PRESERVE A BREATH SAMPLE FOR LATER RETESTING.

Section 1221.3(c) of the Regulations relating to Forensic Alcohol Analysis and Breath Alcohol Analysis, contained in Title 17 of the California Administrative Code provides that only such instruments as have been approved by the California State Department of Health Services shall be used for breath alcohol analysis in this State.

As early as 1973 the California State Department of Health Services approved a device known as an "Intoximeter Field Crimper—Indium Tube Encapsulation Kit". The device allows the collection of breath samples for breath alcohol analysis at a later time than the time of collection.

This device was, is, and has been available at a reasonable cost for several years. It is simple to operate and

would give a defendant the Constitutional right she or he may be entitled to, to wit: retesting.

There are other simple, inexpensive methods which would allow the taking of samples of a person's breath for later breath alcohol analysis which can be used in conjunction with the Intoxilyzer machine used by the County of Sonoma.

The evidence will amply illustrate that the samples collected by several available means can be tested at a subsequent time and that the results of the later tests are *reliable*.

IV. THE PROSECUTION IN SONOMA COUNTY HAS IN EFFECT "SUPPRESSED" MATERIAL EVIDENCE BY ITS FAILURE TO PRESERVE BREATH SAMPLES FOR LATER ANALYSIS.

It is axiomatic that sample of blood, breath, or urine, are material to the proof of drunk driving charges. As pointed out hereinabove certain presumptions arise at certain blood alcohol levels. (See Vehicle Code §23126). The test results, if admissible, trigger certain presumptions relating to guilt.

When one looks at simple analogies it becomes obvious that the failure to preserve breath samples is tantamount to suppression of evidence by law enforcement, which is, contrary to concepts of due process or as others have spoken of it, contrary to fair play.

Take the following three examples:

1. Let us suppose that a bullet is removed from a murder victim, analyzed by the governmental crime lab

for the purpose of connecting it up to the defendant's gun and then thrown away or destroyed before defendant can have it analyzed.

2. Suppose again that fingerprints found at a burglary scene are rolled and put on a card, analyzed and compared with defendant's, and after comparison the card is thrown away before the defendant has an opportunity to have them analyzed.

3. Suppose that a defendant is accused of murder by poison and the liquid is retrieved and analyzed and found by the prosecution to be poison and the substance is thrown away before allowing an analysis by the defendant.

In each of the above situations, one can readily say the defendant has been denied due process. *Hitch* (supra) and *Nation* (supra) tell us that there is something inherently unfair and wrong about the *non-preservation of material evidence*.

In the instant case, law enforcement has deliberately, consciously, and voluntarily chosen to make their own breath test on an Intoxilyzer, knowing that it does not preserve the breath sample taken and in spite of this knowledge has made no effort, although easy and inexpensive to do so, to preserve breath samples for retesting.

It is inherently wrong, unfair and unconstitutional to allow the prosecution to use the *results* of a test performed on *body* fluid or vapor to trigger certain presumptions of guilt without the most basic of safeguards, viz. the preservation of a sample of that fluid or vapor for

retesting by defendant to verify or refute the test results contended for by the prosecution.

The evidence will show in this case that the Intoxilyzer machine used by the prosecution to perform the breath test in this case *is far from foolproof*. It is woefully non-specific, i. e., reacts false positively to a number of substances which are not ethanol. The Intoxilyzer can also be inadvertently or advertently tampered with and can be improperly calibrated, all of which shortcomings are the fundamental and basic reasons why the test results on such a machine must be suppressed in the absence of a retestable preserved breath sample.

V. THE HONORABLE JOSEPH R. LONGACRE, JR., JUDGE OF THE MUNICIPAL COURT OF CONTRA COSTA COUNTY HAS RULED THAT THE FAILURE TO PROVIDE THE DEFENDANT WITH A SAMPLE OF HIS BREATH FOR PURPOSES OF RETESTING AS IS DONE IN THE CASE OF BLOOD AND URINE, DISCRIMINATES AND DENIES THE DEFENDANT A FAIR TRIAL PREVENTING HIM FROM ENJOYING THE DUE PROCESS OF LAW HE IS GUARANTEED.

Although this Court is not bound by another Municipal Court Judge's decision, it is submitted that Judge Longacre's decision is what *Hitch* (supra) and *Nation* (supra) are all about.

A complete copy of Judge Longacre's decision is marked Exhibit "A" and is attached hereto for the convenience of the Court and counsel. It is patently clear that Judge Longacre's analysis of the problem presented herein is a sound one and his decision should be followed.

VI. SISTER COUNTY MUNICIPAL COURT DECISION ON SIMILAR FACTS FAVORABLE TO THE DEFENDANT.

Defendant has heretofore requested that this Court take judicial notice of the decision of Judge Joseph R. Langaere Jr., Judge of the Municipal Court of the County of Contra Costa, in *People vs. Haslam*, Walnut Creek-Danville Judicial District case No. 29904-D.

Although the Court is not bound by this decision, the Court's reasoning and analysis of the application of *Hitch* (supra) and *Nation* (supra) might be helpful to the Court in this cause.

VII. COLORADO AND ARIZONA SUPREME COURTS APPLY PEOPLE V. HITCH (SUPRA) IN FACTUAL SITUATION SIMILAR TO THIS CAUSE.

In the case of *Garcia v. The District Court* (1979) 589 P. 2d 924 the Colorado Supreme Court had before it the precise question posed in the instant case. Colorado has a statutory scheme identical to that in California, in that the same chemical tests are available to a defendant; the identical presumptions apply given certain levels of alcohol in the blood as analyzed by blood, urine or breath tests and the regulations pertinent to chemical analysis provided for preservation of blood and urine samples for the defendant but did not provide for preservation of breath samples.

In *Garcia* (supra) as here no breath sample was preserved and the simulator samples were unavailable. There, as here, there was no requirement to retain breath samples

under Colorado State Board of Health Regulations, but there was such a requirement as to blood and urine.

The full text of the *Garcia* (supra) case is attached hereto marked Exhibit "B" and made a part hereof by reference.

Several holdings were made by the Colorado Court which it is respectfully submitted, apply to this case. They are as follows:

1. "Preservation of the blood, urine, or breath which formed the basis for the conclusion that a person was operating a vehicle while under the influence of intoxicating liquors is essential in view of the presumption that arises from the test." At Page 926;

2. "... procedures exist which permit the preservation of a Breathalyzer sample for use by the defense." At Page 926;

3. "The breath samples requested by the defendants are obviously material to the proof of the drunk driving charges." At Page 929;

4. "It is not necessary for a defendant to demonstrate that the evidence he seeks to discover, but which is no longer available for examination by the Court, would have been favorable to him. *People v. Harmes*, 38 Colo. App. 378, 560 P. 2d 470 (1976), so long as that evidence is not merely 'incidental' to the prosecution's case or to the defendant's affirmative defense. *People v. Bynum*, 192 Colo. 60, 556 P. 2d 469 (1976). It is sufficient that the material requested 'might' be 'favorable to the accused.' *United States v. Bryant*, 142 U.S. App. D.C. 132, 142 N. 21, 439 F. 2d 642, 652 N. 21 (D.C. Cir. 1971)." At Page 929;

5. "The failure of the State to collect and preserve evidence, when those acts can be accomplished as a mere incident to a procedure routinely performed by State agents, is *tantamount to suppression of that evidence*. It is incumbent upon the State to employ regular procedures to preserve evidence which a State agent, in the regular performance of his duties, could reasonably foresee 'might be' 'favorable' to the accused." At Pages 929-930. (Emphasis supplied)

Basically, *Garcia* (supra) holds as does *Hitch* (supra) and *Nation* (supra).

In California, (like Colorado), *Vehicle Code Section 23126* imposes certain presumptions based upon chemical analysis of blood or urine or breath. *Absolutely no distinction is made as to the presumption which comes into play based upon the type of test taken by a defendant.*

California Vehicle Code Section 13353 gives the person arrested the absolute right to have a blood, breath or urine test and he is required to be advised of his choice by law enforcement.

The refusal to submit to a test results in a suspension of one's driver's license for a period of 6 months.

The very language of California Vehicle Code Section 13354 allows the person submitting to one of the three tests to have a retest. The obvious intent of the legislature is to have a sample available for retest, otherwise there can be no retest and the statute would be meaningless.

There can be no freedom of choice *unless the defendant is informed* that if he chooses the breath test, no

sample will be preserved. He must be given the right to choose any of the tests that will preserve to him the right to retest. Otherwise, he has not given an informed consent nor has he had a free choice knowing all the facts, and in such case the results of the test must be suppressed in fairness. It can be properly argued that an unreasonable search and seizure has been made of defendant's person and body vapor when he was not properly informed and advised by law enforcement.

Title 17, Sections 1219 through 1219.3 only require blood and urine samples to be maintained for analysis by the defendant. Thus, a defendant choosing a breath test is *denied equal protection for no rational reason*.

Perhaps, at the time the Administrative Code Regulations were adopted, there was no approved method of collecting breath samples. Such has not however been the case since 1973 as pointed out at an earlier point in this memorandum.

An Arizona Supreme Court decision, *Baca v. Smith*, 1979, 124 Ariz. 353, holds similarly to *Garcia* (supra), and the test is attached and marked Exhibit "C".

VIII. DISCRIMINATORY STATE LEGISLATIVE ACTION REQUIRING PRESERVATION OF BLOOD AND URINE SAMPLES AND NOT BREATH IS A DENIAL OF EQUAL PROTECTION.

In *Reed v. Reed* (1971) 404 U.S. 71, 92 S. Ct. 251, our United States Supreme Court said:

"The Equal Protection clause . . . (den(ies) to states the power to legislate that different treatment

be accorded to persons placed by a statute into different classes on the basis of criteria wholly unrelated to the objective of that statute. A *classification* 'must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike' " quoted in *Brown v. Merlo* (1973) 8 C. 3d 855, 861.

In applying *Reed* (supra) to the instant case, it is obvious that one group of individuals who choose a breath test as opposed to a blood or urine test, are given a different treatment as to their right to a body sample for retesting even though the body sample in question, (breath) is just as vital to the case as blood or urine samples and in spite of the fact that the breath can be *easily* and *inexpensively* preserved for retesting.

It is difficult to conceive how any sound thinking person can argue against the fact that a defendant taking a breath test is denied equal protection where no sample is preserved.

It is neither reasonable nor consistent for law enforcement to ignore the fact that science has had an approved, reasonable, simple, inexpensive way to preserve breath samples for retesting, at least since 1973. Law enforcement cannot be allowed to defend their laxity in preserving breath samples on the basis that Title 17 "doesn't require it".

Vehicle Code Section 13354(c) which provides that:

"Upon the request of the person tested full information concerning the test taken at the direction of the peace officer shall be made available to him or his attorney",

can be read to override Title 17.

This section certainly can be read to intend that "full" information including breath samples be made available to a defendant. Otherwise, the section has little or no meaning.

IX. PEOPLE V. MILLER IS INAPPLICABLE TO THE ISSUES IN THIS CASE BY ITS OWN LANGUAGE.

The prosecution will undoubtedly argue that *People v. Miller* (1975) 52 Cal. App. 3d 666, upholds the use of the Intoxilyzer machine notwithstanding that it does not collect breath samples for retesting.

It must be pointed out to the Court that *Miller* (supra) by the very language in the decision, does not reach the issues of this case and of course, does not and cannot overrule *Hitch* (supra).

In *Miller* (supra) the Court said at Page 670:

"In view of our determination of the basic issue, we do not elucidate the obvious point that *Hitch*, by its express terms, applies only to tests of breath administered after its filing, October 21, 1974. All the tests in the three cases before us were conducted before that date."

X. THE CONSEQUENCES OF A CONVICTION OF DRUNK DRIVING ARE EXTREMELY SERIOUS.

Drunk driving is a major misdemeanor. The consequences of conviction are potentially horrendous. In addition to fines, jail sentences may be imposed as can driver's license suspensions. Second convictions within five years require at least 48 hours jail time and could result in a 1 year jail term, and up to \$1,000.00 in fines and a mandatory 1 year license suspension. Greater consequences flow from additional convictions.

Additional consequences flow from a drunk driving conviction, such as higher insurance premiums and difficulty in obtaining insurance.

As Judge Longacre stated in his opinion:

"This Court wants it understood that it is not condoning leniency to the drunk driver, but it is insisting that every accused drunk driver who is being exposed to the *drastic consequences of a conviction* be afforded reasonable opportunity to employ a non-discriminatory defense in his behalf. As Justice Mosk indicated in the *Nation* decision, the integrity of our entire judicial system is dramatically involved." (Emphasis supplied)

This is not a case wherein the Court is being asked to dismiss the case at this time. The prosecution may proceed with their case sans the test results if it chooses to do so.

This is a case where the Court must suppress the evidence based on constitutional standards which invoke fair play. This is not a case which admits of technical or fine distinctions. It is clear under the law that the test results must be suppressed.

Dated: 3/31/81

Respectfully submitted,
Murphy, Brownscombe, Keegan
& Kenney

By: /s/ Thomas R. Kenney

Attorneys for Defendant.

(Captioned Omitted)

No. 77262

POINTS AND AUTHORITIES IN SUPPORT OF
MOTION TO SUPPRESS AND MOTION
FOR PROTECTIVE ORDER

(Filed October 16, 1981)

I. Background Information:

The above named defendant was arrested on or about December 12, 1980, by the California Highway Patrol, and chose the breath test after having been encouraged to do so by the arresting officers. Defendant anticipates that it will not be disputed at the time of the hearing of this motion that every arresting agency in the Sonoma County area utilizes one Intoxilyzer breath machine located at the Sonoma County Jail when a suspected 23102a arrestee chooses a breath test pursuant to §13353 of the California Vehicle Code; that officers do not inform these defendants that this choice of the three tests will not afford the defendant an opportunity for later testing; that no breath samples of the defendant are preserved for later testing, and that the simulator samples and solutions and compounds used to calibrate this machine are not preserved for later retesting by the defendant.

Defendant maintains, in substance, that the failure of a law enforcement agency to preserve a breath sample for his own retesting is discriminatory, denies equal protection and due process of law to an accused, and denies a fair trial unless the no breath sample preserved as evidence and/or for retesting is discriminatory and is a denial of due process of law in contravention of the Fourth, Fifth and Fourteenth Amendments to the United States

Constitution and Article I, Sections 7 and 13, of the California Constitution.

3. That the failure to preserve the simulator samples and solutions and compounds used to calibrate the Intoxilyzer machine used by the County of Sonoma on December 12, 1980, before the defendant was administered the test, is discriminatory, and is a denial of due process of law in contravention of the Fourth, Fifth and Fourteenth Amendments to the United States Constitution and Article I, Sections 7 and 13 of the California Constitution.

4. That the failure of the arresting officers and/or the State Criminalistic Lab, Department of Justice, to at least inform (orally or in writing) suspected intoxicated drivers who choose a breath test that this is the only test of the three available pursuant to Vehicle Code Section 13353 that does not afford them the opportunity of a later retesting of the sample is a denial of due process of law in contravention of the Fourth, Fifth and Fourteenth Amendments to the United States Constitution and Article I, Sections 7 and 13 of the California Constitution.

This motion is based on this notice, the pleadings, records and files in this action, the attached memorandum of points and authorities, the supporting declaration of defendant and such other oral and/or written evidence and declarations as may hereinafter be offered at the time of the hearing of this motion.

Dated: March 8, 1981.

Murphy, Brownscombe, Keegan &
Kenney

By: /s/ Thomas R. Kenney
Attorney for Defendant

No. 77262

(Caption Omitted)

DECLARATION OF DEFENDANT MICHAEL
GENE COX IN SUPPORT OF MOTION
TO SUPPRESS, ETC.

(Filed April 9, 1981)

I, MICHAEL GENE COX, declare:

1. I am the defendant in the above entitled proceeding;

2. On or about December 12, 1980, I resided at 2138 Westwood Drive, Santa Rosa, California.

3. On December 12, 1980, I was arrested by an officer of the California Highway Patrol for an alleged violation of California Code Section 23102(a).

4. On or about said date of my arrest, I was taken to the Sonoma County Jail and administered a breath test on an Intoxilyzer machine. No other type of chemical test was administered to me on this date, by the arresting officers or any other law enforcement agency.

5. The arresting officers read me an admonition of my rights under 13353 of the California Vehicle Code and then suggested that I take the breath test to determine the alcoholic content in my system.

6. At no time did any of the arresting officers or any other law enforcement representative advise me that there would be no sample of my breath preserved for later analysis or comparison analysis.

7. At no time did any of the arresting officers or any other law enforcement officer indicate to me that in the blood and urine tests, samples were available to an arrested individual for later analysis, differentiating these from the breath test.

8. At no time did the arresting officer or any other law enforcement official advise me that no means had been provided by the County of Sonoma, State of California, or any of its law enforcement agencies in this county for the preservation of a sample of breath.

9. I would not have submitted to the breath test of the intoxilyzer machine had I been informed that no sample of my breath would be retained or preserved for later retesting.

10. Had I been so informed, I would have chosen one of the other two tests, urine or blood, thus affording me an opportunity for my own retesting by an expert of my choice.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on April 8, 1981, at Santa Rosa, California.

/s/ Michael Gene Cox

No. 77262

(Caption Omitted)

**DECLARATION OF DEFENDANT MICHAEL
GENE COX IN SUPPORT OF MOTION
TO SUPPRESS, ETC.**

(Filed May 19, 1981)

I, MICHAEL GENE COX, declare:

1. I am the defendant in the above entitled proceeding.

2. On or about December 12, 1980, I resided at 2138 Westwood Drive, Santa Rosa, California.

3. On December 12, 1980, I was arrested by an officer of the California Highway Patrol for an alleged violation of California Vehicle Code Section 23102(a).

4. On or about said date of my arrest, I was taken to the Sonoma County Jail and administered a breath test on an Intoxilyzer machine. No other type of chemical test was administered to me on this date, by the arresting officers or any other law enforcement agency.

5. The arresting officers read me an admonition of my rights under 13353 of the California Vehicle Code and then suggested that I take the breath test to determine the alcoholic content in my system.

6. At no time did any of the arresting officers or any other law enforcement representative advise me that there would be no sample of my breath preserved for later analysis or comparison analysis.

7. At no time did any of the arresting officers or any other law enforcement officer indicate to me that in the blood and urine tests, samples were available to an arrested individual for later analysis, differentiating these from the breath test.

8. At no time did the arresting officer or any other law enforcement official advise me that no means had been provided by the County of Sonoma, State of California, or any of its law enforcement agencies in this county for the preservation of a sample of breath.

9. I would not have submitted to the breath test on the intoxilyzer machine had I been informed that no sample of my breath would be retained or preserved for later retesting.

10. Had I been so informed, I would have chosen one of the other two tests, urine or blood, thus affording me an opportunity for my own retesting by an expert of my choice..

I declare under penalty of perjury that the foregoing is true and correct.

Executed on May 15, 1981, at Santa Rosa, California.

/s/ Michael Gene Cox

No. 77262 TCR

(Caption Omitted)

**SUPPLEMENTAL POINTS AND AUTHORITIES
IN SUPPORT OF DEFENDANT'S MOTION
TO SUPPRESS EVIDENCE**

(Filed June 25, 1981)

[These points and authorities should be considered together with those previously filed with the court by the defendant.]

Title 17, California Administrative Code, provides, as is stated in points and authorities submitted by the People

in opposition to defendant's motion, for the procedures to be followed in Forensic Alcohol Analysis.

Title 17 §1219 is as follows:

"Samples taken for forensic alcohol analysis and breath alcohol analysis shall be collected and handled in a manner approved by the Department. The identity and integrity of the samples shall be maintained through collection to analysis and reporting." (Emphasis added)

Title 17 §1221. Setting out the procedures for analysis of breath alcohol. §1221(c) indicates that breath alcohol analysis can only be performed on samples which are either (a) "collected with a sample capturing instrument designed for entrapment of a breath sample", and (b) a capturing instrument designed "for entrapment of a breath sample for later analysis". In either situation for the instrument to be approved for breath alcohol analysis under Title 17, a distinct sample of breath must be collected. The detailed conditions under which the breath sample must be taken are set out in §1219.3 as follows:

"A breath sample shall be expired breath which is essentially alveolar in composition. The quantity of the breath sample shall be established by direct volumetric measurement. The breath sample shall be collected only after the subject has been under continuous observation for at least fifteen minutes prior to collection of the breath sample, during which time the subject must not have ingested alcoholic beverages or other fluids, regurgitated, vomited, eaten, or smoked." (Emphasis added)

Since the quantity of the breath taken as the sample must be determined by its *volume*, it must, of necessity, be captured in an enclosed container. Thus, a container in the apparatus must be filled to capacity in order to prop-

erly conduct the test in accordance with §1221.1. This sample collected by authorities, in a container suitable to testing, under their control and capable of yielding the only scientific evidence available of defendant's state of intoxication and capable of triggering a presumption of that intoxication, is destroyed by the willful act of purging the container with air.

In the People's points and authorities at P. 2, L. 25, etc., they contend that the People have no duty to collect evidence but merely to preserve evidence in the state's possession. This is all that the defendant requires. The state did have a sample of his breath but failed to preserve it as required by *People v. Hitch* (1974) 12 C 3d 641 and *People v. Nation* (1980) 26 C 3d 169.

The People at P. 9, L. 19, etc., of their motion indicate that the intoxilyzer used by them is incapable of *collecting* a sample (which, of course, would make the machine intelligible for use under Title 17 §1219 and §1221(c), and that the act of testing destroys the sample. They cite *State v. Young* (1980) 614 P 2d at 446; however, *Young* does *not* deal with the tests performed by an intoxilyzer of the type in the case before the court. In *Young* testing was done by gas chromatography which, of necessity, destroys the sample. At P.1 of the People's motion they state that the test is performed by measuring the relative absorption of infrared energy which would have no chemical effect on the integrity of the sample. At P. 2 they admit that the sample is lost through a purging of the sample container with air. Thus, the sample of defendant's breath was not destroyed by the testing but by a purposeful act of the operator of the machine after he had made his tests. Thus, the numerous cases cited by the

People in support of the proposition that a defendant is not denied due process when evidence is lost in the course of scientific analysis, have no relevance in the case before the court. Here the sample was collected by the authorities, tested by them but not altered by that test, and then, when the authorities had obtained results satisfactory to them, was destroyed by their acts.

Under *Hitch* (supra) the court in a case such as this must make a three-pronged inquiry: (1) was the evidence at issue material to the case; (2) was it destroyed by the investigative agency and (3) assuming affirmative answers to these two questions, have the People proved that rigorous and systematic procedures designed to preserve such evidence were being enforced at the time the evidence was destroyed? It is clear that the first two questions must be answered in the affirmative. In regards to the third, the People have not even claimed that they attempted to preserve the sample. They just deny that any sample was collected and if the court finds this to be true, it must also find that the method of collecting and testing defendant's breath did not comply with the requirements of Title 17 and thus must suppress the evidence. Alternatively, they claim that it is either too costly or impractical or impossible to preserve the sample that they tested. They certainly have not proved (nor even claimed) that they have any procedures designed to preserve the evidence. Thus, the People having failed to comply with the teaching of *Hitch*, the evidence must be suppressed.

CONCLUSION

In light of the above arguments and those presented previously in defendant's motion to suppress evidence, it

is respectfully urged that the defendant's motion be granted and the results of the breath alcohol test administered to the defendant be suppressed.

Respectfully submitted,

Murphy, Brownscombe, Keegan &
Kenny

By: /s/ Thomas R. Kenney
Attorneys for Defendant.

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF SONOMA

No. 77262

PEOPLE OF THE STATE OF CALIFORNIA

Plaintiff/Respondent,

vs.

MICHAEL GENE COX

Defendant/Appellant.

PROPOSED SETTLED STATEMENT
OF FACTS

(Filed August 31, 1981)

INTRODUCTION

The defendant appeals from an order of the Municipal Court entitled on July 3, 1981 denying his Motion to Suppress Evidence. A Notice of Appeal was filed with this court on July 30, 1981 (Exhibit A) together with a Stipu-

lation consolidating five other cases which had been heard together with this case by the Municipal Court. (Exhibit B)

STATEMENT OF FACTS

The defendant (and each of the defendants' noted in Exhibit B) was arrested for driving under the influence of alcohol, in the County of Sonoma, was transported to Sonoma County Jail and there tested with a blood-alcohol device known as an Omicron Intoxalizer.

Pursuant to a Stipulation entered into a hearing of the motion to suppress on this case it was agreed as follows:

"2. That the defendant and the People by their respective counsel agree that all points and authorities, testimony, findings and the decision by the law and motion judge in People v. Bertram, action #78402 TCR, shall be binding on the People and the defendant in this cause as if the testimony, points and authorities, etc., had been given in this cause."

Respectfully submitted,

/s/ Thomas Kenney

/s/ William D. A. Wallace

Attorneys for Defendant

No. 77262

(Captioned Omitted)

NOTICE OF APPEAL

(Filed July 20, 1981)

(Filed October 16, 1981)

Defendant MICHAEL GENE FOX hereby appeals from an order of the Municipal Court entered on July 10, 1981 denying his Motion to Suppress Evidence.

DATED: July 27, 1981

/s/ Thomas Kenney

/s/ William D. A. Wallace

Attorneys for Defendant

(Caption Omitted)

No. 77262

STIPULATION AND ORDER

(Filed October 16, 1981)

IT IS HEREBY STIPULATED by and between the attorneys for the respective parties that for purposes of appeal the following cases should be consolidated with this case:

People v. Herbert Berreyesa	79839
People v. Patricia J. Keeffe	78305
People v. Thomas Muldoon	79044
People v. KenseL L. Furner	78206
People v. Clinton James Brown Jr.	79846
People v. Michael Gene Cox	77262

Date: 7-30-81 /s/ illegible
 Deputy District Attorney
 Date: 7-30-81 /s/ Thomas Kenney
 Date: 7-30-81 /s/ William D. A. Wallace

ORDER

Pursuant to the stipulation of counsel, IT IS ORDERED that the cases be consolidated as setforth herein.

(SEAL)

/s/ illegible
 Judge

(Caption Omitted)

No. 77262

DECLARATION OF JERRY W. CURRY

(Filed October 16, 1981)

I, JERRY W. CURRY, declare as follows:

1. My name is JERRY W. CURRY and my business address is 1041 4th Street, Santa Rosa, California;
2. I have a B.A. degree from San Jose State University in Medical Technology, Chemistry and Microbiology. My year of graduation from San Jose State University was 1961;
3. I am a Forensic Alcohol Supervisor duly qualified as such by the State of California to perform Forensic

Alcohol Analysis. I have been so qualified since December 21, 1970.

4. I have been associated with Central Pathology Laboratory, whose present address is 1041 4th Street, Santa Rosa, California, since June 1, 1969.

5. I am an officer, stockholder, and a member of the Board of Directors of Central Pathology Laboratory, a California corporation engaged in the science of, among other scientific studies, forensic alcohol analysis from human blood, urine and breath.

6. I am the lab manager of Central Pathology Laboratory.

7. I have personally performed forensic alcohol analysis in conjunction with my association with Central Pathology Laboratory, on human samples of blood, urine, and breath and have personally tested and analyzed well over 1,000 samples of blood, well over 1,000 samples of urine and well over 1,000 samples of breath from different humans for alcohol analysis.

8. From approximately 1970 to some date in 1975, Central Pathology Laboratory performed blood, urine and breath alcohol analysis on behalf of the District Attorney's office of the County of Sonoma in conjunction with said District Attorney's criminal law enforcement duties, which analyses were primarily involved with individuals suspected of driving motor vehicles while under the influence of alcoholic beverages in violation of the laws of the State of California.

9. From 1972 to a date in 1975, law enforcement agencies in Sonoma County, such as the Sheriff's Office, Cali-

fornia Highway Patrol and various City Police groups, used a scientific instrument known as an "Intoximeter Field Crimper-Indium Tube Encapsulation Kit" for the purpose of collecting breath samples in the field, of persons suspected of driving a vehicle under the influence of intoxicating beverages, where those persons requested a breath test. Various police stations throughout Sonoma County also had these instruments on hand at their various stations for collection of breath samples. The above described Intoximeter Field Crimper is designed as a capturing device for entrapment of alcohol in a breath sample for later analysis.

It is capable of being used in a stationery location or in a vehicle and the device operates by plugging it into a 110 volts receptacle or a cigarette lighter receptacle in a motor vehicle. The device and accompanying kit is simple to use and requires very little room to house same. No scientific background or knowledge is required to operate the device or capture breath samples.

10. The "Intoximeter Field Crimper—Indium Tube Encapsulation Kit" has been approved for use in California for use in breath alcohol analysis since August 8, 1973.

11. The Intoximeter Field Crimper referred to in this declaration and as is approved by the State of California, is designed to collect 3 samples of breath, *each of which may be separately analyzed at a time later than the moment of collection thereof.*

12. Between 1972 and a date in 1975, law enforcement personnel in Sonoma County who had collected breath

samples with the Intoximeter Field Crimper would submit three samples of breath from each suspect in Indium Tubes to Central Pathology Laboratory. The laboratory would in turn routinely analyze two of the three samples and retain the third sample intact for retesting by the suspect, should a request for same be made by the suspect.

13. At all times mentioned herein, including the present date, Central Pathology Laboratory owned and utilized a "Gas Chromatograph Intoximeter Mark II". This instrument was approved by the State of California for Breath Alcohol Analysis in 1971 and to this day said instrument continues to be so approved. This instrument allows the *immediate* analysis of breath samples collected by direct expiration by the subject into the instrument in which the measurement of alcohol concentration is performed and it also permits later analysis of breath samples which are collected with an Intoximeter Field Crimper—Indium Tube Encapsulation Kit. Both methods of breath alcohol analysis, i.e. the immediate analysis by direct expiration into the instrument and the *later analysis* from collected samples have been authorized in California for several years.

14. To my personal knowledge, breath alcohol analysis results from collected samples of breath using the aforesaid Intoximeter Field Crimper, have been admissible in Court as evidence in cases involving persons suspected of driving motor vehicles while under the influence of intoxicating liquor.

15. To my knowledge, the aforesaid Intoximeter Field Crimper—Indium Tube Encapsulation Kits are and have been readily available for purchase and use.

16. The Gas Chromatograph Intoximeter Mark II instrument is available for use in the Central Pathology Laboratory at this time and will continue to be available for use in conducting breath alcohol analysis on a scientifically reliable basis.

17. It is my considered opinion that breath samples which are properly collected with the Intoximeter Field Crimper—Indium Tube Encapsulation Kit may be readily and accurately tested and analyzed for alcohol content. Tests and experiments I have personally performed have indicated that a retained breath sample in an indium tube may be scientifically and reliably tested for up to 3 months after the collection of the breath sample.

18. An approved method of collecting breath samples for later analysis for alcohol content has existed since August of 1973. It is my opinion that law enforcement personnel in Sonoma County have had the capability of capturing and retaining said breath samples for the past several years had they desired to do so. The Intoximeter Field Crimper—Indium Tube Encapsulation Kit may be used separate and apart from any other instrument for the breath collection process and does not depend upon any other instrument for the collection of the breath sample.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on May 18, 1981, at Santa Rosa, California.

/s/ Jerry W. Curry

DIVISION FOUR
SUPERIOR COURT OF CALIFORNIA,
COUNTY OF SONOMA

APPELLATE DEPARTMENT

No. 215-C A016374

THE PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff/Respondent

vs.

MICHAEL GENE COX, et al.,

Defendants/Appellants

DECISION

(Filed January 20, 1982)

The issues herein are identical with those involved in the matter of *People v. Albert Walter Trombetta*, No. 209-C, decided this day. We attach a copy of our decision in that matter hereto and incorporate its reasoning by reference.

The order denying defendants' motion to suppress is affirmed.

Dated: January 19, 1982

/s/ illegible

Judge

WE CONCUR:

/s/ WILLIAM B. BOONE,

/s/ JOHN J. GOTHES,

Judge

DIVISION FOUR

Thomas R. Kenney, Esq.

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Telephone: (707) 545-5040

Attorneys for Appellants

SUPERIOR COURT OF CALIFORNIA,

COUNTY OF SONOMA

APPELLATE DEPARTMENT

No. 215-C A016374

PETITION FOR REHEARING AND
APPLICATION FOR CERTIFICATE

(Filed February 9, 1982)

THE PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff/Respondent,

vs.

MICHAEL GENE COX, THOMAS NELSON,
MULDOON, CLINTON JAMES BROWN,

KENSEL LEE FURNER, PATRICIA JANE
KEEFFE, HERBERT JOHN BERREYESSA,
and JAMES K. SCHNEIDER,

Defendants/Appellants.

TO: THE APPELLATE DEPARTMENT OF THE
ABOVE ENTITLED COURT.

Pursuant to Rules of Court, 107, defendants and appellants (hereinafter appellants) herewith petition for a rehearing or in the alternative for an order directing that this matter be certified for transfer to the District Court of Appeal pursuant to Rules of Court 62 and 63(a).

BASIS FOR REHEARING

I

PEOPLE V. MILLER IS NOT CONTROLLING

In *Miller*, (1975) 52 C A 3d 666 the Court stated in its own language that its holding was dicta. (See page 670 of the opinion.)

In addition, the *Miller* court did not address itself to the equal protection issue. On page 668 of the *Miller* decision they impliedly demonstrate that they were either unaware that the field crimper was available or didn't consider such a fact if they knew it was available.

II

EQUAL PROTECTION REQUIRES EQUALITY UNDER THE SAME CONDITIONS

The preservataion of blood and urine samples is mandated by applicable Administrative Code regulations, yet breath collection is not so mandated. This alone is a clear violation of the equal protection provisions of the state and federal constitutions.

Garcia v. the District Court (1979) 589 P. 2d 924; *People v. Nation* (1980) 263 C 3d 169; and *People v. Hitch* (1974) 12 C 3d 641 all direct that law enforcement must make preservable evidence available to a defendant or suffer the consequences (suppression of the tests or evidence). Thus, destructive testing is prohibited.

III

THESE CONSOLIDATED CASES SHOULD BE CERTIFIED TO THE DISTRICT COURT OF APPEAL

There are hundreds of pending 23102(a) prosecutions in this jurisdiction, and several other motions similar to appellants' motion either before the Municipal Court or under submission in the 1982 Appellate Division of this Superior Court.

Under 63(A) important and far reaching questions of law are involved, hence, under Rule 62(a) and 63(a) this matter should be certified.

Enhanced penalties under the new 23152 CVC rules further emphasize this need. In addition, the distinctions set forth in *Miller* (supra) and the holdings of sister state Supreme Courts (*Garcia*, supra) give this Court a further basis for certification.

WHEREFORE, appellants request either a rehearing or certification to the District Court of Appeal.

Dated: February 9, 1982.

Respectfully submitted,

MURPHY, BROWNSCOMBE, KEEGAN,
KENNEY & BARBOSE

/s/ THOMAS R. KENNEY,

Attorneys for Appellants.

DIVISION FOUR
SUPERIOR COURT OF CALIFORNIA,
COUNTY OF SONOMA
APPELLATE DEPARTMENT
No. 215-C
(Stamped A016374)
PEOPLE OF THE STATE OF CALIFORNIA,
Plaintiff/Respondent,
vs.
MICHAEL GENE COX, et al.,
Defendant/Appellant.

ORDER DENYING REHEARING AND
CERTIFYING FOR TRANSFER
TO COURT OF APPEAL

(Filed February 25, 1982)

The Petition for Rehearing is denied.

It is hereby certified that transfer of the herein case to the Court of Appeal appears necessary to settle an im-

portant question of law, namely, whether the holding in *People v. Miller* (1975) 52 Cal.App.3d 666, that failure to preserve a retestable breath sample does not render Intoxilyzer breath test results inadmissible, applies to a fact situation in which at the time of testing the breath sample on the Intoxilyzer, there was available to law enforcement authorities a device which would have preserved a breath sample for later testing, the Intoximeter Field Crimper-Indium Tube Encapsulation Kit, which had been approved by the Department of Health and stipulated to be financially and practicably feasible for the State to operate.

The Appellate Department of the Superior Court on January 20, 1982, affirmed an order of the Municipal Court denying defendant's motion to suppress. The basis of the Appellate Department's decision was that it was bound by the holding of *People v. Miller, supra*, and dicta contained therein.

Dated: February 24, 1982.

/s/ illegible,
Judge of the Superior Court

/s/ William B. Boone
Judge of the Superior Court

/s/ John J. Goethe
Judge of the Superior Court

J. FRED HALEY
Attorney at Law
One Kaiser Plaza
Oakland, California 94612
834-9977

MUNICIPAL COURT OF CALIFORNIA,
COUNTY OF CONTRA COSTA

Walnut Creek-Danville Judicial District

No. 31381

PEOPLE OF THE STATE OF CALIFORNIA,
Plaintiff

vs

GREGORY MOLLER WARD,
Defendant

NOTICE OF MOTION AND MOTION FOR
PRE-TRIAL DISCOVERY, ALTERNATIVE
MOTION TO EXCLUDE RESULTS OF
INTOXILYZER TEST

(Filed February 26, 1982)

TO WILLIAM A. O'MALLEY, DISTRICT ATTORNEY
OF CONTRA COSTA COUNTY, AND TO THE ABOVE
ENTITLED COURT:

PLEASE TAKE NOTICE that on February 26, 1981,
at 9:30 a.m., or as soon thereafter as the matter may be
heard, defendant's counsel will move the above entitled
Court for an order from said Court directing the District
Attorney to make available to defendant's attorney for
examination, copying or testing any and all of the follow-
ing information, documents or other things in the pos-

session of said District Attorney or any of his employees, agents, officers or deputies.

1. All notes, memoranda, whether handwritten or typed, made by police officers or other investigating officers pertaining to their conversations with the defendant on or about July 6, 1980 (other than the written police report which is already in the possession of defendant's counsel).

2. Records of the maintenance of the intoxilyzer machine through which defendant's breath sample was tested, which records shall be limited to thirty days before and after July 6, 1980 (17 Cal. Admin. Code, Section 1222.2).

3. Copies of permanent record or log book pertaining to calibration records for the intoxilyzer which was used to test defendant's breath sample, said records being limited to the period of thirty days before and after July 6, 1980 (17 Cal. Admin. Code, Section 1222.2).

4. Copies of records of analysis of quality control samples provided by a forensic alcohol laboratory for the period of ten days before and after July 6, 1980, and the name and qualifications of the operator who performed the analysis of reference samples on the intoxilyzer which tested defendant's breath sample (17 Cal. Admin. Code, Section 1221.4(a)(2)(A)).

5. If no quality control samples were analyzed within ten days prior to July 6, 1980, then copies of records and the dates of the first quality control samples analyzed prior to July 6, 1980, and the records of the testing of unknown samples thereafter up to and including twenty-five samples (17 Cal. Admin. Code, Section 1221.4(a)(2)(C)).

6. Copies of any and all records of controlled experiments performed on the intoxilyzer which tested the defendant's breath sample showing the correlation between the subject's breath sample and the blood sample taken at the same time (17 Cal. Admin. Code, Section 1221.2(a) (4)).

7. A sample of defendant Gregory Moller Ward's breath which was taken on July 6, 1980.

Defendant attaches hereto and incorporates herein as Exhibit A the declaration under penalty of perjury of Kenneth Dean Parker, toxicologist, of Hine Incorporated in support of, and as an extension of, this motion.

IN THE ALTERNATIVE, under the assumption that the California Highway Patrol did not preserve and retain a sample of defendant's breath which was subjected to testing by the Walnut Creek Police Department's intoxilyzer, defendant's counsel herein will move the above entitled Court to grant said counsel's motion to exclude the results of the intoxilyzer test in the above entitled matter. Said motions will be made and based upon the attached points and authorities, the declaration of Kenneth Dean Parker attached hereto as Exhibit A, the declaration of defendant Gregory Moller Ward, and upon such other oral and documentary evidence as may be presented at the hearing of this motion.

Dated: February 5, 1981.

J. FRED HALEY
Attorney for Defendant

**POINTS AND AUTHORITIES RE MOTION
FOR DISCOVERY**

Under criminal pre-trial discovery procedure, it has been generally held that the defendant can compel the

prosecution to permit inspection and copying of all evidence which can throw light on the issues of the case absent some governmental requirement that information be kept confidential for the purpose of law enforcement. *Vance v. Superior Court*, 51 C. 2d 92, 330 P. 2d 733.

The state's obligation is not necessarily to convict, but to see that so far as possible the truth of a case emerges. No respectable interest of the state is served by concealing information which is material to the case. *People v. Riser*, 47 C. 2d 566, 305 P. 2d 1.

The accused has the right, before trial, to examine original notes made by officers concerning his oral statements and further to inspect and copy any written statements prepared from those notes. *Funk v. Superior Court*, 52 C. 2d 423 at 424, 340 P. 2d 593 (1959).

Records of the maintenance, calibration and analysis of quality control samples with respect to the intoxilyzer machine which tested defendant's breath sample are clearly relevant and material to this action inasmuch as the results from that intoxilyzer machine are the most critical evidence in this case. A fortiori production of the preserved sample of defendant's breath is necessary in order to enable defendant to test the reliability and precision of the intoxilyzer's results.

POINTS AND AUTHORITIES IN SUPPORT OF MOTION TO EXCLUDE RESULTS OF INTOXILYZER TEST

On July 6, 1980, the defendant Gregory Moller Ward was stopped by Officer R. K. English, Jr. of the California Highway Patrol, I.D. No. 8218, on suspicion of driving under the influence of alcohol. The defendant was

given a breath test by use of an intoxilyzer which produced a reading of .17 and .18.

This intoxilyzer, unlike other devices in use for testing the alcoholic content of a suspect's breath, had no ampul which can be removed and preserved for later retesting. In the past, county law enforcement agencies utilized the services of an institution known as Ultra Chem Corporation in testing breath samples. That corporation's intoxilyzer had the ability to preserve such breath samples and every defendant who chose this particular test was given a written statement informing him that he was entitled to have the sample of his breath saved for purposes of such retesting. Ever since the county law enforcement agencies have taken over the operation of the intoxilyzer aspects of blood alcohol measurement, there is no longer any method by which a breath sample is or can be preserved.

It is significant to note that the alleged "drunk driver" is not informed by the law enforcement authorities that no sample of his breath will be retained for later testing verification by a toxicologist of the alleged "drunk driver's" selection; whereas if he or she takes a blood or urine test, such a sample will be retained. In most cases, and in this case, the alleged "drunk driver" is encouraged and persuaded by the law enforcement authorities to take the breath test. One explanation of such encouragement and/or persuasion is that said law enforcement authorities realize that with the breath test there can be no verification. Like Ceaser's wife, these law enforcement authorities should be "above suspicion" on this critical subject.

Because the Walnut Creek Police Department's intoxilyzer has no capability for preserving any sample of

defendant's breath, no independent analysis of the defendant's breath could or can be made to determine whether or not the machine was functioning properly or if the test was accurate.

The intoxilyzer did not provide a sample which can be retained for retesting defendant's breath for its alcoholic content and therefore People have made it impossible for defendant to check the results of the test. The California Supreme Court in *People v. Hitch* (1974) 12 C. 3d 641 at 652 have affirmed the right of the defendant to receive a sample of his breath for retesting. The Court in that case stated in pertinent part:

"As we have explained, the test ampoule, its contents and the reference ampoule customarily used in the test constitute material evidence on the issue of the driver's guilt or innocence of the charge of driving a vehicle under the influence of intoxicating liquor. We conclude that the investigative agency involved in the test *has a duty to preserve and disclose such evidence.*"

12 C. 3d 641 at 652, 117 Ca. Rptr. 9 (emphasis added).

More recently and in the case of *People v. Nation*, 26 C. 3d 169, the Supreme Court considered the prosecution's failure to preserve a sample of the defendant's semen with respect to charges for lewd and lascivious conduct on a child, and whether or not this failure to preserve such a sample deprived the defendant of his constitutional due process rights. The Court, referring to *People v. Hitch* (supra), affirmed the fact that the prosecution has an obligation and duty to preserve such evidence, even in the absence of a request for its preservation. The Court stated in pertinent part:

"In *People v. Hitch* (citation), we held that the obligation to disclose the existence of material evidence places on the state *a correlative duty to preserve such evidence even without a request therefor*, and directed that in the future law enforcement agencies take reasonable measures to ensure its adequate perservation."

26 C. 3d 169 at 175 (emphasis added).

The thrust of defendant Nation's appeal is identical to that of defendant Ward here, that is, that if law enforcement agencies take or recover a sample, they have a duty to take reasonable steps to preserve that evidence and make it available to the defense. More importantly, and inasmuch as the Supreme Court's decision in *Nation* utilized the principles in the *Hitch* case (which dealt with a breath sample in a 23102a(a) case), the *Nation* decision should be completely applicable to breath samples as well.

The Supreme Court in *People v. Nation* further indicated that the imposition of such a duty not only protects the due process rights of the defendant, but also society's interest in the integrity of the judicial system. The Court stated:

"The duty to preserve critical evidence enhances the reliability of the trial process. . . . The duty of the prosecution is not simply to obtain convictions, but to fully and fairly present to the court the evidence material to the charge."

26 C. 3d 169 at 177.

Certainly the breath sample in the instant case is the most "critical" evidence in the case. The results of the intoxilyzer or the other blood alcohol tests impose a heavy presumption against a defendant, a presumption which, as this Court well knows, is difficult to overcome.

Therefore it would appear that the prosecution and law enforcement agencies have a duty to take reasonable steps to preserve and retain a defendant's breath sample in order to allow that defendant an opportunity to retest the sample and scrutinize the accuracy of the intoxilyzer. Preservation and retention of such a sample cannot be considered unreasonable or an overbearing burden on the prosecution in light of the fact that such preservation and retention of breath samples were available previously when county law enforcement agencies utilized the services of Ultra Chem Corporation. Further, the defendant requests the Court to take judicial notice of the testimony of the expert which was presented in an identical motion before this Court in the case of *People v. Steven L. Haslam*, Case No. 29904-0, and the factual determinations made thereon by the Honorable Joseph R. Longacre, Jr., in his **MEMORANDUM OF DECISION AND ORDER** on that case dated October 8, 1980. Judge Longacre, finding no unreasonable burden upon law enforcement agencies to preserve such breath samples, stated in pertinent part:

"... There has been and is now available on the open market a crimping device, using an indium tube, which can be adapted to the present breath testing for a cost of approximately \$200.00 a machine. Once the initial cost is paid there is little if any upkeep thereon. The crimping device was demonstrated to the court and it is an exceedingly simple process in its operation. The expert testified that the cost for collection of breath sample approximates \$7.00. The crimping device can be used by police officer personnel and can be done simultaneously with the testing that is now being accomplished by such personnel. The machine and method of operation are approved by the Department of Public Health of California."

MEMORANDUM OF DECISION AND ORDER, October 8, 1980, Page 8.

Inasmuch as the *Haslam* case as well as the instant case arise out of the same judicial district and concern the same intoxilyzer, factual determinations made by Judge Longacre set forth above are equally applicable to the circumstances of the instant case.

It is clear under the *Hitch* and *Nation* decisions that due process requires that the defendant have a reasonable opportunity to test the breath sample which will be used against him. If the defendant is unable to test the breath sample and therefore the accuracy of the machine which will create a critical presumption against him, defendant's due process rights are effectively denied him. This denial works a severe hardship on the defendant's preparation of his case and detrimentally effects the fundamental fairness of any trial which follows.

Title 17, Article 6, Sections 1220 through 1225 of the California Administrative Code appropriately comply with the holding of the *Hitch* and *Nation* decisions. Those administrative code sections direct the retention and preservation of a blood or urine sample which is tested to determine the blood alcohol level of a defendant. By mandating the retention of such samples, a defendant's due process rights are kept intact. The defendant is afforded the opportunity to further test the sample and thereby determine the accuracy or inaccuracy of the test results which will be used against him. There are no similar provisions to protect the defendant's due process rights by mandating preservation of breath samples and therefore the above referred to sections, 1220 through 1225, do not comply with the holding in the *Hitch* and *Nation* decisions.

The California Legislature, through Section 23126 of the Vehicle Code, gives equal weight to the results of any breath, blood or urine tests administered to a defendant for purposes of establishing the presumption of intoxication. However, the defendant is denied any real ability to combat the test which generates that presumption should he have the uninformed misfortune of selecting an intoxilyzer to measure his blood alcohol level.

The defendant in the instant case, by selecting the intoxilyzer with the "help" of the law enforcement authorities, made the retesting of his breath sample impossible and any rights which the defendant had to scrutinize the authenticity and accuracy of the test results were summarily abolished. Therefore the introduction of the results of this intoxilyzer test into evidence would constitute a denial of the defendant's right to due process.

It is respectfully submitted that we are dealing here with a critical and extremely important privilege, i.e., the right to drive a vehicle upon the public highways of the State of California. The Court can suspend that essential privilege on a first conviction and it will necessarily be suspended for one year on a second conviction within five years. These suspensions are binding even against driving to and from employment. Therefore the Court here is sitting in judgment on an issue which strikes at the essence of our society's basic social unit, the family. Without a wage earner and without income, the family cannot survive or will have great difficulty in surviving without public assistance. Therefore this Court should take a very careful look at all the ramifications of this breath test without preservation of a verification sample and should insist, where so much is at stake in so many of these cases

in the way of economic impact, that the same protections of fairness be afforded the driver who takes the breath test as the driver who takes the blood or urine test.

Probably the explanation for why Title 17 of the California Administrative Code does not provide for retention of the breath test sample is that at the time of the enactment of Sections 1220 through 1225 of Section 7 there was no adequate equipment to capture and retain a sample, but that is no longer the case, and this inequity should be "set right" by this Court.

Since it is within the discretion of the trial court to exclude such test results, the defendant respectfully moves this Court to exclude the results of the intoxilyzer from the evidence presented at the trial in this matter.

Dated: February 5, 1981.

J. FRED HALEY

Attorney for Defendant

EXHIBIT A

HINE INCORPORATED

357 Tehama St., San Francisco, California 94103 (415-777-2210), mailing address: P.O. Box 7604 Rincon Annex, San Francisco, CA 94120

2 December 1980

Mr. J. Frederick Haley
Attorney at Law
Ordway Building—One Kaiser Plaza
Oakland, CA 94612

RE: People v. Gregory M. Ward

DOA: 7/6/80 Municipal Court #31381
Our File: MLA-3906

Dear Mr. Haley:

Reference is made to your letters dated 24 October, 24 November 1980 and our consultations and conversations which followed in the above captioned matter. Based upon my preliminary review of facts in the case and consultations had with you for preparation for expert witness testimony from the toxicological point of view, I offer the following in declaration form:

1. Records show that an Intoxilyzer breath test of subject's breath was made for determination of forensic blood alcohol value. The breath samples and analyzed by the Intoximeter were discarded following the non-destructive test performed according to usual procedures. Additional breath samples from the accused were not taken and retained to be made available for independent defense testing for determination of accuracy and reliability of the alleged forensic blood alcohol value obtained by the prosecution's test.
2. Such procedures for collection and retention of subject's breath for later testing by defense can be performed using the California Department of Health approved Indium tube crimper device which provides for the encapsulation of breath samples for retention of items of breath to become evidence. Such a device has been used by Contra Costa County in the past for collection and preservation of breath evidence samples.

3. Preliminary review of records and certain facts in the case show a considerable and significant disparity between the alleged blood alcohol value for defendant from prosecution's Intoxilyzer test and other categories of facts including calculation of blood alcohol from drinks consumed, field sobriety test performance, driving of the vehicle, general demeanor and outward impression of accused. In order to resolve this disparity in the facts I need to have a sample of subject's breath for testing to effectively participate as a toxologist in the preparation of this case with the attorney for trial.
4. Even though a breath sample is not available for testing and is essential for effective evaluation of the case in my opinion it would be essential that certain records and samples bearing on the prosecution's Intoxilyzer test results be made available for review. These should include water alcohol reference control samples (Simulator and Calibration Standards) used for periodic testing of the Intoxilyzer instrument and the Simulator Calibration solution used for defendant's test, copy of records of preventive maintenance for the Intoxilyzer machine used, results of periodic calibration and testing of Intoxilyzer, records of service and preventive maintenance for Intoxilyzer, notes and laboratory results and records of preparation of water alcohol calibration solutions used in quality assurance program, copy of records of quality assurance procedures, copy of records of training and certification for operator of Intoxilyzer for defendant's test, records of results of Department of Health Alco-

hol Check Samples periodically issued and tested for licensing of forensic alcohol laboratory, copy of record showing test results for subject and checklist of performance of test and calibration negative and positive controls.

5. Without the receipt of the foregoing discovery I am unable to participate effectively as a technical consultant as to toxicological aspects and preparation of the case with you. This is of particular importance and concern to me as there was not retained a sample of subject's breath so that the correctness of the blood alcohol value can be checked as to correctness by re-testing the retained breath sample. This situation allows an item (samples of subject's breath) taken to become evidence in the case to be used by the prosecution consumed by the prosecution and then the results used unverified at the time of trial as evidence.

If you have any questions about the information provided please advise me accordingly.

I declare under penalty of perjury that the foregoing is true and correct. Executed on 2 December 1980 at San Francisco, California.

/s/ Kenneth Dean Parker

Very truly yours,
/s/ Kenneth Dean Parker
M. Crim., D-ABFT
Toxicologist/Criminalist

"EXHIBIT B"

J. FRED HALEY
Attorney at Law
One Kaiser Plaza
Oakland, California 94612
834-9977

No. 31381

MUNICIPAL COURT OF CALIFORNIA,
COUNTY OF CONTRA COSTA

WALNUT CREEK—DANVILLE JUDICIAL DISTRICT
PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff

vs.

GREGORY MOLLER WARD,

Defendant

DECLARATION OF GREGORY MOLLER WARD

I, GREGORY MOLLER WARD, defendant herein, declare:

On or about July 6, 1980, I was arrested by Officer R. K. English, Jr. of the California Highway Patrol for an alleged violation of Vehicle Code §23102a. Upon arrest I was transported by the arresting officer to the Walnut Creek Police Department, where I was given a breath test to determine intoxication. The breath test was administered by Officer G. Chellew of the California Highway Patrol.

At no time prior to being given the breath test was I offered any option of taking either a breath, blood or urine test to determine intoxication. I was merely given the breath test without being offered a choice of either of the other two tests.

At no time prior to being given the breath test was I informed that a sample of my breath would not be retained for future retesting by a toxicologist of my selection. Neither was I informed, since I was not given the choice of taking a blood or a urine test, that if I was given one of those two tests a sample of my blood or urine would be retained for future retesting by a toxicologist of my selection.

Had I known that a sample of my breath would not be retained for future retesting and verification, whereas a sample of my blood or urine would be so retained, I would have requested that I be given either a blood or a urine test rather than a breath test.

I do not believe that at the time of my arrest on July 6, 1980, I was under the influence of alcohol to such an extent that it impaired my ability to drive an automobile.

I hereby declare under penalty of perjury that the foregoing is true and correct.

Executed on February 10, 1981, at Lafayette, California.

/s/ Gregory Moller Ward

WILLIAM A. O'MALLEY
District Attorney
County of Contra Costa
Deputy District Attorney
1957-C Parkside Drive
Concord, California 94520
671-4335

No. 31381-7

IN THE MUNICIPAL COURT OF THE STATE OF
CALIFORNIA, COUNTY OF CONTRA COSTA
WALNUT CREEK—DANVILLE JUDICIAL DISTRICT

PEOPLE OF THE STATE OF CALIFORNIA

vs.

GREGORY WARD,

Defendant.

MOTION FOR DISCOVERY

Discovery in the above entitled case is hereby requested as to all evidence relating to the Intoxilyzer used to determine the defendant's blood alcohol concentration.

Dated: 26 Feb. 81

/s/ J. Fred Haley
Defense Attorney

No. 25592 (Trial Court No. 29684-8)

25616 30410-5

25617 30226-5

25717 31381-7

25718 32153-9

IN THE SUPERIOR COURT OF THE STATE
OF CALIFORNIA
IN AND FOR THE COUNTY OF CONTRA COSTA
APPELLATE DEPARTMENT

PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff & Respondent

vs.

GALE BERNELL BERRY,

RICHARD GLEN LARSON,

RICHARD GLEN LARSON,

GREGORY MOLLER WARD,

GREGORY MOLLER WARD,

Defendants & Appellants

ORDER

(Filed December 4, 1981)

Judgments of conviction in the above-entitled matters, made and entered in the Municipal Court of the Walnut Creek-Danville Judicial District, are affirmed.

The Court, on its own motion, hereby certifies the above-entitled cases to the Court of Appeal for the following reasons:

1. The issue of equal protection of laws as applied to the intoxilyzer machine, which does not preserve a breath sample for subsequent testing, has not heretofore been decided.

2. The Supreme Court of Colorado in the case of *Garcia v. The District Court*, 589 P.2d 924, has ruled that a defendant must be given a separate sample of his breath test if that test is to be used in evidence.

3. A possible review of *People v. Miller*, 52 CA3d 666, in light of the arguments made in the brief; and

4. The great importance of a resolution of this issue in view of the new legislation relating to driving under the influence.

/s/ MARTIN E. ROTHENBERG,
Presiding Judge.

/s/ WAYNE A. WESTOVER,
Judge.

/s/ NORMAN SPELLBERG,
Judge.

I, J. R. OLSSON, County Clerk and Clerk of the Supreme Court of the State of California, in and for the County of Contra Costa, do hereby certify that the foregoing is a true copy of the original judgment entered by said Court in the above entitled cause on the day of, 19....., and now remaining of record in this Court.

OFFICE OF THE CLERK

Court of Appeal
State of California

FIRST APPELLATE DISTRICT
CLIFFORD C. PORTER, Clerk

May 14, 1982

DEPUTIES

Richard J. Eyman, Chief Deputy
Roy F. Lippi

Leo A. Weissmann

Walter McAdam

Betty Kavanagh

R. D. Barrow

D. J. Gulliford

Penny Lawrence, Secretary

SAN FRANCISCO 94102

4154 State Building

Civic Center

557-1896

J. Frederick Haley

Attorney at Law

One Kaiser Plaza

Oakland, California 94612

Charles C. Kirk

Deputy Attorney General

6000 State Building

San Francisco, California 94102

Re: Case No. A017265 (1/Crim. 23779)

In re Ward on Habeas Corpus

Division Four

Dear Counsel:

The Court has directed me to invite counsel to submit letter briefs indicating whether the trial record in this case, or judicially noticeable materials, provide answers to the following questions:

- (1) Is it feasible to require breath samples to be pre-useful results?
- (2) Would later testing of such a sample yield useful results?

The pertinence of these questions lies in their relation to a possible duty to preserve a breath sample when an intoxilyzer is used. See *People v. Hitch* (1974) 12 Cal.3d 641.

Your responses should be received by June 1, 1982.

Very truly yours,
/s/ C. Porter
Clerk

JOHN A. PETTIS
Attorney at Law
1034 Court Street
Martinez, CA 94553
Telephone: (415) 229-0900
Attorney for Defendant

No. 29684-8

MUNICIPAL COURT OF CALIFORNIA
COUNTY OF CONTRA COSTA

THE PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff,

v.

GALE BERNELL BERRY,

Defendant.

MOTION FOR DISCOVERY

Date: 9/18/80
Time: 9:30 a.m.
Dept. 2

(Filed September 5, 1980)

This Motion is directed not only to the District Attorney of Contra Costa County but to all law enforcement officers, agents, agencies, bureaus, departments, employees and attorneys prosecuting the above-entitled action (hereinafter collectively called the "PEOPLE"). Defendant will move for an Order requiring the PEOPLE to do as follows:

1. Supply the defendant's attorney with one (1) copy (by Xerox reproduction, or other method of comparable quality) of each of the following:

- A. A complete set of engineering drawings, plans, and specifications of the Omicron Intoxilyzer such as was used to test the alcoholic content of the defendant's breath on the night the incident occurred.
- B. The serial number and date of manufacture, together with the date of delivery, to the Walnut Creek Police Department of the Omicron Intoxilyzer unit in question.
- C. The full corporate name and address of the manufacturer of the intoxilyzer unit in question.
- D. Copies of all printed or written test and research data submitted by the manufacturer of the instrument to the Department of Justice, the Department of Health, and/or the Department of General Services, or to the criminal investigation division of the State of California or the Attorney General's Office or the District Attorney of the County of Contra Costa which pertain to the workings, specificity, selectivity, or accuracy of the machine in question, including but not limited to scientific and mechanical data.
- E. Any data of similar kind now in the possession of any agency as set forth above which is in the possession or under the control of said agency, but which was not submitted by the manufacturer of the machine, but which was either independently gathered by said agency or submitted by parties other than manufacturer of the instrument.
- F. A copy of the complete maintenance history of the Omicron Intoxilyzer in question.

- G. The complete text of copies of any directive notice or bulletin, or item of a similar type, as issued to the using agencies by any of the above manufacturer of the instrument involved.
- H. A copy of the instruction manual as supplied with the particular instrument in question, together with copies of each other instruction manual that has been supplied by the manufacturer of the machine or by any governmental agency involved prior to or subsequent to the issuance of the manual as delivered together with the machine.
- I. The results and all supporting data related thereto now in the possession or under the control of any governmental agency as mentioned above herein of any comparative tests between the Omicron Intoxilyzer and any other breath-testing machine.
- J. The results of each and every breath test as run on the Omicron Intoxilyzer now in the possession of the Walnut Creek Police Department between the dates of December 30, 1980 to the present.

2. Allow the defendant's attorney to examine any real evidence relevant to this case not mentioned above which is in the possession of, or subject to the control of the PEOPLE.

3. To allow defendant's attorney and defendant's expert witnesses access to the Omicron Intoxilyzer instrument now in the possession of the Walnut Creek Police Department upon the giving of 48 hours notice for the purpose of examining and testing said machine as against the plans and specifications as set out by the manufac-

turer, said inspection to be carried out between the hours of 8:00 a.m. and 5:00 p.m. Monday through Friday, excluding holidays therefrom, with an expert from the Department of Justice present.

4. Provide the names and addresses of all witnesses, particularly expert witnesses, who will testify at trial as to the conduct, results or interpretation of the breath analysis tests performed on defendant.

5. Provide the original air sample taken from the defendant, the original reference sample, and the disposable sanitary mouthpiece/saliva trap used in the testing of the defendant.

6. Any and all records, documents, notations, memoranda, papers, and records relating to the installation, maintenance, calibration, and repair of the Omicron Intoxilyzer in use by Walnut Creek Police Department on January 16, 1980 (number unknown) from December 1, 1979 to March 31, 1980.

7. Any and all records, documents, notations, memoranda, papers and records relating to the installation, maintenance, calibration, and repair of the Omicron Intoxilyzer in use by Walnut Creek Police Department on January 16, 1980 (number unknown) from December 1, 1979 to March 31, 1980. Said records are to include, but are not limited to, the names of all persons taking and administering any test on said machine together with the counter number, date, time result and the Omicron Intoxilyzer Check List and graph of each such test.

8. The Record of Omicron Intoxilyzer usage for the Omicron Intoxilyzer in use by Walnut Creek Police De-

partment on January 16, 1980 from December 1, 1979 to March 31, 1980.

9. Any and all literature, brochures, pamphlets, memoranda and/or manufacturer publications supplied to the Walnut Creek Police Department, or anyone else relating to the installation, maintenance, operation, calibration, and/or repair of the Omicron Intoxilyzer, including literature dealing with the manufacturer's recommended operating procedures for the detection of alcohol in the breath of persons under suspicion of driving a motor vehicle under the influence of alcohol.

This Motion may be deemed severable as to objects and means of discovery mentioned herein above; may be granted on such other, further, or different terms and conditions as are reasonable and just; and will be based on this notice, the supporting points and authorities attached hereto, the pleadings the records and files and documents, and oral and documentary evidence to be presented at the hearing.

Dated: September 5, 1980.

Respectfully submitted,
/s/ JOHN A. PETTIS,
Attorney for Defendant

(Caption Omitted)

No. 29684-8

**MEMORANDUM OF POINTS AND AUTHORITIES
IN SUPPORT OF MOTION FOR DISCOVERY**

1. Absent some governmental requirement that the information be kept confidential for the purpose of law

enforcement, the State has no interest in denying accused access to all evidence that can throw light on issues in this case. *People vs. Riser* (1956) 47 Cal. 2d 566; cf. *In Re Ferguson* (1971) 5 Cal. 3d 525.

2. Obligation of the prosecution is not to convict, but to see that, as far as possible, the truth emerges. This is also true of the ultimate statement of its responsibility to provide a fair trial under the Due Process Clause of the Fourteenth Amendment to the United States Constitution and the Due Process Clause of the California Constitution. No proper interest of the State is served by its concealment of information which is material, generously conceived, to the case at bench, including all possible defenses. *In Re Ferguson, supra*, 5 Cal. 3d 525, 531-532; *Giles vs. State of Maryland* (1967) 386 U.S. 66, 96, 97, (87 S.Ct. 793, 808, 809) (Fortas, concurring opinion).

3. Certain evidence has specifically held discoverable, including: Laboratory reports (*Walker vs. Superior Court* (1957) 155 Cal. App. 2d 134, 139-141) and real evidence *People vs. Lindsay* (1964) 227 Cal. App. 2d 482).

4. If information is not actually in the possession of the PEOPLE, but is available to the PEOPLE, they may be required to obtain it and disclose it to the defendant. *Engstrom vs. Superior Court* (1971) 20 Cal. App. 3d 240; *Hill vs. Superior Court* (1974) 10 Cal. 3d 812.

5. Defendant has the right to inspect, view, hear and copy before trial all relevant evidence subject to discovery. *People v. Garner* (1961) 57 Cal. 2d 135.

6. The right to pre-trial discovery is fundamental to a fair trial and discovery cannot be denied on the basis

that no showing has been made that the documents exist, as such a requirement would frustrate all discovery. Defendant is entitled to discovery by showing that he cannot obtain the information by his own efforts and the requested discovery will reasonably assist him in the preparation of his defense. *Hill vs. Superior Court, supra*, 10 Cal.3d 812; *Pitchess vs. Superior Court* (1974) 11 Cal.3d 541; *Eleazer vs. Superior Court* (1970) 1 Cal. 3d 847.

7. The names and addresses of expert witnesses are essential for the adequate preparation of the defense case. See *Norton vs. Superior Court* (1959) 173 Cal. App. 2d 133; *People vs. Johnson* (1974) 38 Cal. App. 3d 228. In *Johnson*, the Court particularly held that the defendant is entitled to the identity and the reports of the State's experts.

8. Evidence taken from the defendant is subject to inspection and testing by the defense. See *People vs. Washington* (1957) 163 Cal. App. 2d 134. Here the breath sample must be produced for defendant's counsel and expert to test the accuracy of the purported results. See *People vs. Hitch* (1974) 11 Cal.3d 159. Similarly, the reference sample and the sanitary mouthpiece are necessary evidence to permit the defendant to assess the accuracy of the test results.

Dated: September 5, 1980

/s/ JOHN A. PETTIS
Attorney for Defendant

(Caption Omitted)

No. 29684-8

DECLARATION IN SUPPORT OF MOTION FOR
DISCOVERY

I, JOHN A. PETTIS, hereby declare:

1. I am the attorney for the defendant in the above-entitled action.

2. Defendant submitted to two (2) breath tests on the Omicron Intoxilyzer subsequent to his arrest for a violation of Section 23102(a) of the Vehicle Code. The results of the two tests were .20.

3. I am informed and believe that certain information as set forth above is in the possession of, or available to, the District Attorney or other governmental agency from which said information can be obtained.

4. I am informed and believe that some or all of said officers or agencies have in their possession or under their control some or all of the information described on the Notice of Motion attached hereto, and that it is necessary that such information be made available to the defendant and to his attorney in order that they may properly prepare said cause for trial. Said information requested is material and relevant to the trial of said action in that it involves the machine used to test the breath of the defendant for its alcoholic content and its relation to the percentage of alcohol in the blood of the defendant which is the foundation in support of the presumption of intoxication as found in the California Codes and will shed light

on the accuracy and specificity of the machine in question, both in general and as used directly in this case.

5. I am informed and believe that the information as set forth above is solely under the control of the prosecution and is not known or available to the defendant or his counsel.

6. I believe that it is necessary in order to prepare for trial that I be afforded prompt and reasonable access to all such evidence and information as set forth above available to the PEOPLE which meets the description as set forth in the attached Notice of Motion.

7. I believe that the accuracy and specificity of the Omicron Intoxilyzer as used herein to test the breath of the defendant is suspect and that the discovery of the information as requested above and its exposure to the defendant's experts will provide the basis for a defense for the defendant in this case.

8. I declare under penalty of perjury that the foregoing is true and correct except for those things that are stated on information and belief, and those I believe true.

Dated: September 4, 1980.

/s/ JOHN A. PETTIS
Attorney for Defendant

(Proof of Service Omitted in Printing)

(Caption Omitted)

No. 29684-8

**NOTICE OF MOTION AND MOTION TO EXCLUDE
RESULTS OF AN INTOXILYZER TEST**

(Filed November 20, 1980)

**TO: DISTRICT ATTORNEY OF CONTRA COSTA
COUNTY**

NOTICE IS HEREBY GIVEN that on Thursday, December 11, 1980 at 9:30 a.m., or as soon thereafter as the matter can be heard in Department 1, the defendant GALE BERNELL BERRY, by and through his attorney, JOHN A. PETTIS, will move the Court for an order to exclude results of an intoxilyzer test taken on defendant by WALNUT CREEK POLICE DEPARTMENT on January 16, 1980.

This Motion will be based on this Notice of Motion, the Points and Authorities attached hereto, the pleadings, records, files in this action and oral and documentary evidence to be presented at the hearing on the Motion.

Dated: November 18, 1980.

/s/ JOHN A. PETTIS
Attorney for Defendant

(Caption Omitted)

No. 29684-8

POINTS AND AUTHORITIES IN SUPPORT OF
MOTION TO EXCLUDE RESULTS OF AN INTOXI-
LYZER TEST

(Filed November 20, 1980)

STATEMENT OF FACTS

On January 16, 1980, the defendant, GALE BERNELL BERRY, was stopped by Officer P. WORKMAN, Badge No. 8047, of the California Highway Patrol, on suspicion of driving under the influence of alcohol.

Defendant BERRY was given a breath test, by use of intoxilyzer at WALNUT CREEK POLICE DEPARTMENT. The test produced a reading of .20.

The intoxilyzer, unlike other devices in use protesting the alcoholic content of a suspect's breath, had no ampule which can be removed for later retesting.

The intoxilyzer utilizes a technique known as "infrared absorption". Due to the non-destructive properties of infrared testing, *it is possible* with the intoxilyzer to preserve the alcohol in the actual sample analyzed by the instrument for subsequent reanalysis at a later date.

As the prosecution failed to preserve this sample, no independent analysis of defendant's breath could be made to check the accuracy of the test.

Additionally, until March 16, 1980, suspects could have been brought to the offices of the ULTRACHEM CORPORATION where a breath test could be made and a sample obtained for later analysis.

ARGUMENT

I

DEFENDANT'S RIGHT TO HAVE AN IMPARTIAL
ANALYSIS OF BREATH TEST

The intoxilyzer did not provide a sample which can be retained for retesting defendant's breath for its alcoholic content. California Vehicle Code section 13354 (b) provides in part:

The person tested may, at his own expense, have . . . any other person of his own choosing administer a test in addition to any administered at the discretion of a peace officer for the purposes of determining the amount of alcohol in his blood at the time alleged as shown by chemical analysis of his blood, breath or urine. . . .

II

BREATH SAMPLE IF MATERIAL EVIDENCE

The breath sample given by defendant at the time of his arrest is material evidence of his guilt or innocence. This is stated more fully in *People vs. Hitch*, 12 Cal 3d 641, 117, Cal Rptr 9, 527 P2d 361 (1974):

" . . . the test ampoule, its contents and the reference ampoule customarily used in the test constitute *material evidence* on the issue of the driver's guilt or driver's guilt or innocence of the charge of driving a vehicle under the influence of intoxicating liquor. We conclude that the investigative agency involved in the test has a *duty to preserve and disclose such evidence.*" (emphasis added)

Because the breath sample was destroyed, defendant is without the opportunity to have the evidence against him examined by a person of his own choosing. Defendant

is thereby denied due process. *Van Halen vs. Municipal Court*, 3 Cal App 3d 233, 83, Cal Rptr 140 (1969).

III

STATE HAS DUTY TO PRESERVE EVIDENCE

If the state recovers a sample, it has the duty to take reasonable steps to preserve the evidence and make it available to the defense (*People vs. Nation*, 1980, 161 Cal Rptr 299 at page 302).

The Supreme Court's interpretation in *People vs. Nation* of their holding in *People vs. Hitch* is supportive of defendant's contention that there is a duty to preserve such evidence.

"In *Hitch* (citations) we held, that the obligation to disclose the existence of material evidence places on the State a correlative duty to preserve such evidence even without a request therefore." (*People vs. Nation*, Id at page 302)

Defendant asserts that there exists a reasonable possibility that a second test of the sample would be favorable to him on the issue of guilty or innocence and that the arbitrary deprivation of this material evidence erodes the integrity of the judicial system and the reliability of the trial process (*People vs. Nation*, Id, at page 202).

SUMMARY

Since the intoxilyzer utilized by the WALNUT CREEK POLICE DEPARTMENT fails to preserve a breath sample for retesting, the introduction of the results of this test into evidence would constitute a denial of defendant's right to due process.

Additionally, the defense relies on the Court's holdings in *People vs. Nation*, which did not require a request for a sample as a condition precedent to preservation of such evidence, and that it is immensely reasonable for the State to capture and preserve a second breath sample where there is an available, simple, inexpensive, and just method for doing so.

Based on the above Points and Authorities, defendant respectfully moves the Court to exclude the results of the breath test from the evidence presented at trial.

Dated: November 18, 1980.

Respectfully submitted,

/s/ JOHN A. PETTIS

Attorney for Defendant

(Proof of Service Omitted in Printing)

A017266

IN THE COURT OF APPEAL OF THE
STATE OF CALIFORNIA
FIRST APPELLATE DISTRICT, DIVISION FOUR

In re
GALE BERNELL BERRY
On Habeas Corpus

TRAVERSE/DENIAL TO RETURN TO ORDER
TO SHOW CAUSE

(Filed June 18, 1982)

JOHN A. PETTIS
Attorney at Law
1034 Court Street
Martinez, California
Telephone: (415) 229-0900

Petitioner GALE BERNELL BERRY hereby traverses the Return to the Order to Show Cause and by this pleading states:

I

Petitioner hereby realleges each of the allegations of his petition on file herein and denies each and every material allegation contained in the Return that is inconsistent therewith. Petitioner hereby incorporates the allegations of the petition as if fully set forth herein.

II

Petitioner hereby incorporates by reference and relies on all the pleadings and papers contained in the record in the cases of GALE BERNELL BERRY, NO. A017266, GREGORY MOLLER WARD, NO. A017265 and ALBERT WALTER TROMBETTA, NO. A016358.

III

Petitioner realleges that it is feasible to preserve a sample of the breath and that such a sample would yield useful results at such time that it is retested.

WHEREFORE, petitioner respectfully prays that the Court grant petitioner habeas corpus relief; suppress the results of the breath test; and grant petitioner such further relief as the Court deems proper.

DATED: June 17, 1982.

Respectfully submitted,

JOHN A. PETTIS,
Attorney for Petitioner

VERIFICATION

I am the petitioner in the above-entitled proceeding. I have read the foregoing traverse and know the contents thereof. The same is true of my own knowledge, except as to those matters which are therein alleged on information and belief, and as to those matters, I believe it to be true.

Executed on June 1, 1982, in Martinez, Contra Costa County, California.

I declare under penalty of perjury that the foregoing is true and correct.

GALE BERNELL BERRY

ARGUMENT

THE FAILURE TO DISCLOSE MATERIAL
EVIDENCE IS A VIOLATION OF THE DUE
PROCESS CLAUSE OF THE FOURTEENTH
AMENDMENT

Petitioner contends that the People have a duty to disclose evidence which might be favorable to the defense of the accused and thereby have a correlative duty to preserve that evidence. Failure of this duty constitutes a violation of due process and thereby necessitates the imposition of sanctions.

The Court in *United States v. Bryant*, 439 F2d 642 (1971) stated that "the due process requirement [of disclosure] applies to all evidence which might have led the jury to entertain a reasonable doubt about [defendant's] guilt, and that this test is to be applied generously to the

accused when there is substantial room for doubt as to what effect disclosure might have had."

The Court in *Brady v. Maryland*, 373 U.S. 83, held that "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment irrespective of the good faith or bad faith of the prosecution." (The Court in *People v. Hitch*, 12 C.3d 641 (1974) stated that "in some circumstances the prosecution must, without request, disclose substantial material evidence favorable to the accused.")

Hitch, supra, also held that "the results of the breathalyzer test by their very nature constitute material evidence on the issue of guilt or innocence upon a charge of drunk driving."

In the instant case petitioner was tested on an intoxilyzer - a breath testing device used in the County of Contra Costa. In keeping with the spirit of *Hitch*, the test results of the intoxilyzer are material to the guilt of the accused and therefore subject to the duty of disclosure which the courts have placed on the People.

The People contend that there is no duty to preserve a sample. Petitioner turns to the Court in *United States v. Bryant*, supra. There the Court held "that the duty of disclosure attaches in some form once the Government has first gathered and taken possession of the evidence in question. Otherwise, disclosure might be avoided by destroying vital evidence before prosecution begins or before defendants hear of its existence. Hence, we hold that before a request for discovery has been made, the duty of disclosure is operative as a duty of preservation.

Only if evidence is carefully preserved during the early stages of investigation will disclosure be possible later." [emphasis added]

The Court in *Hitch*, using principles from informant cases stated:

"This Court also has recognized the duty of preservation of evidence required to be disclosed under the due process requirements of *Brady*. The People's duty to disclose the identity of an informant who is a material witness on the issue of guilt includes the duty to undertake reasonable efforts to obtain information by which the defense may locate such an informer. . . . In short, the prosecution has a *duty to undertake reasonable efforts to preserve* material evidence, to wit the testimony of the material informant. [emphasis added]

The People quote *People v. Miller*, 52 Cal.App.2d 666 (1975) in putting forth the premise that the evidence (the breath of the accused) gathered in the intoxilyzer was not evidence of which they could take possession. It is petitioner's contention that matter that can be "gathered" and tested is at those times possessed.

Petitioner cites *United States v. Bryant*, *supra* in which that Court stated:

"Technically it may be that evidence which cannot be found is not in the government's "possession". . . . But this line of reasoning is far too facile, and clearly self-defeating. The language of *Brady*, Rule 16 and the Jencks Act includes no reference to the timing of possession and suppression. . . ."

Thus petitioner contends that there is something to preserve when the intoxilyzer is used.

The *Bryant* court discussed sanctions for the suppression of evidence. The Court stated that sanctions would be imposed for bad faith suppression of evidence, but that exceptions would be made for good faith suppression. The Court stated further:

"An exception for good faith loss of important evidence must not be allowed to swallow the discovery rules and the burden of explanation on the Government must be a heavy one; but criminal convictions otherwise based on sufficient evidence may be permitted to stand so long as the Government made "earnest efforts" to preserve crucial materials and to find them once a discovery request is made."

"We hold that the sanctions for non-disclosure based on loss of evidence will be invoked in the future unless the Government can show that it has promulgated, enforced and attempted in good faith to follow rigorous and systematic procedures designed preserve all discoverable evidence gathered in the course of a criminal investigation."

The *Hitch* court held that evidence that might have resulted from a retest of the ampoules would serve to impeach the test results of the police. The Court on that basis held that suppressing the test results would serve to balance the "improper failure to preserve potentially impeaching evidence."

CONCLUSION

Petitioner's right of due process was violated by the People's failure to preserve for disclosure, a sample of the breath that was used as evidence in the determination of said petitioner's guilt. Petitioner urges that the breath test result be suppressed as a sanction for violation of his constitutionally protected right.

DATED: June 17, 1982.

/s/ JOHN A. PETTIS,
Attorney for Petitioner

A017265

IN THE COURT OF APPEAL OF THE
STATE OF CALIFORNIA
FIRST APPELLATE DISTRICT, DIVISION FOUR

In re
GREGORY MOLLER WARD
on Habeas Corpus.
TRAVERSE/DENIAL TO RETURN TO ORDER
TO SHOW CAUSE

(Filed June 17, 1982)

J. FREDERICK HALEY
Attorney at Law
One Kaiser Plaza
Oakland, CA
(415) 834-9977

Attorney for Petitioner

Petitioner Gregory Moller Ward hereby traverses the Return to the Order to Show Cause of the People of the State of California and by this verified pleading states:

I

Petitioner Gregory Moller Ward realleges as though fully set forth at length herein and incorporates herein by this reference all of the allegations of Paragraphs I through XIV inclusive of this Petition for Writ of Habeas Corpus and the Motion of Points and Authorities accompanying said petition, filed in the Supreme Court of the State of California, No. 22560 and petitioner denies each and every allegation contained in the Return which is inconsistent therewith.

II

Petitioner Gregory Moller Ward hereby denies each and every allegation contained in paragraph II of the Return to the Order to Show Cause.

III

Petitioner Ward hereby incorporates herein and relies on the declarations, pleadings, court records, and other documents attached to his Petition which documents were labeled Exhibit A, B, C and pertain to the litigation at the Municipal Court, Superior Court, Appellate Department, and Court of Appeals, First District, Division Three which litigation gave rise to his Petition.

IV

Petitioner Ward hereby incorporates herein and relies on his letter brief dated June 7, 1982, filed herein. Petitioner Ward hereby incorporates herein and relies on the declarations attached hereto of: Declaration of Richard Kiszka, Exhibit "A"; Declaration of Ernest J. Williams, Exhibit "B"; and Declaration of Manley J. Luckey, Exhibit "C".

V

Petitioner Ward hereby incorporates herein and relies on the pleadings, records, transcripts and other documents filed heretofore with this Court involving the cases

of: *People v. Trombetta*, Court of Appeal, No. A016358; *People v. Cox*, Court of Appeal, No. A016374; and *In re Berry, on Habeas Corpus*, Court of Appeal, No. A17266.

VI

Petitioner is informed and believes, and upon such information and belief alleges the following:

1. That the Intoxilyzer Model 4011A captures, collects and possesses a breath sample during its analysis of said breath sample;

2. That it is feasible to require breath samples to be preserved for retesting when an Intoxilyzer 4011A is used;

3. That such a breath sample will produce readings of breath alcoholic content that are reliable, trustworthy and accurate;

4. That two methods for such preservation of a sample are readily and inexpensively available in the form of a) siligia gel preserved sample tube; and b) Indium Tube Encapsulation kit.

WHEREFORE, petitioner respectfully prays that the Court, after a full hearing of all issues necessary for a deposition of petitioner's claim on merits, grant petitioner habeas corpus relief, order that petitioner be discharged from said restraint of liberty and grant whatever further relief is appropriate and in the interests of justice.

DATED: June 17, 1982.

Respectfully Submitted,

/s/ J. FREDERICK HALEY

Attorney for Petitioner

VERIFICATION

I, J. FREDERICK, HALEY, declare as follows:

I am an attorney at law duly licensed to practice before all courts of the State of California, and am the attorney for Petitioner herein.

I am authorized to file this Traverse/Denial to Return to Order to Show Cause on Petitioner's behalf. I am personally familiar with the matters stated in the foregoing Traverse/Denial to Return to Order to Show Cause and declare under penalty of perjury that the foregoing petition is true and correct of my knowledge except as to my matters which are therein stated on my information and belief and as to those matters I believe them to be true.

Executed on June 17, 1982, at Oakland, California.

/s/ J. FREDERICK HALEY

Attorney for Petitioner

ARGUMENT AND DECLARATIONS

The written argument and declarations will be submitted at the hearing on June 18, 1982. Please note that Petitioner has not had adequate time to prepare and submit this argument and obtain and submit the declarations prior to June 18, 1982; the Return to the Order to Show Cause was due, by Order of the Supreme Court of California, on May 10, 1982, and the Return is dated June 3, 1982, and was served on Petitioner thereafter. This Traverse/Denial to Return to Order to Show Cause and its accompanying Argument and Declarations will be resubmitted in its entirety on June 18, 1982.

A016358

(Sonoma Sup. Ct.
No. 209-C)

IN THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA
FIRST APPELLATE DISTRICT, DIVISION FOUR

THE PEOPLE,

Plaintiff and Respondent,

vs.

ALBERT WALTER TROMBETTA

Defendant and Appellant.

A016374

(Sonoma Sup. Ct.
No. 215-C)

THE PEOPLE,

Plaintiff and Respondent,

vs.

MICHAEL GENE COX, et al.,

Defendants and Appellants.

A017265

1 Crim. 23779

In re GREGORY MOLLER WARD
on Habeas Corpus.

A017266

1 Crim. 22517

In re GALE BERNELL BEPPY
on Habeas Corpus.

(Filed March 28, 1982)

These cases arise, in diverse procedural settings, from misdemeanor prosecutions for driving under the influence of intoxicating liquor (formerly Veh. Code §§ 23101, subd. (a), or 23102, subd. (a); now §§ 23153, subd. (a), or 23152, subd. (a), respectively). The issue raised is whether intoxilyzer breath results are rendered inadmissible in a drunk driving trial by virtue of the failure of law enforcement officials either (1) to preserve a retestable breath sample although a device which preserves breath samples for retesting is available, or (2) to inform the detained motorist that no retestable specimen will be preserved if he selects breath rather than blood or urine as the test medium.

In each municipal court case the defendant moved to suppress evidence obtained from an intoxilyzer breath test. (Pen. Code, § 1538.5) These motions were denied. Each defendant then appealed to the superior court which

affirmed the lower court order; the cases were then certified for transfer to this court. In the *Trombetta* and *Cox* groups of cases this court accepted transfer. It appears that *Trombetta* and its companion case have not proceeded to trial. The record does not indicate whether the cases in the *Cox* group have proceeded to trial; no judgment was entered in these cases.

An appeal may not be taken from a pretrial order of the municipal court. (Code Civ. Proc., § 904.2) The correct procedure in *Trombetta* and *Cox* would therefore have been for the defendants to wait until a judgment was entered in the municipal court and then appeal that judgment. Because no appealable order was challenged in *Trombetta* or *Cox* those appeals should have been dismissed by the appellate department of the superior court. (*People v. Superior Court (Scott)* (1980) 112 Cal.App.3d 602, 606.)

In the *Ward* and *Berry* cases judgments of conviction were followed by superior court appeals; transfers to the Court of Appeal were denied whereupon those defendants petitioned the Supreme Court for writs of habeas corpus. The Supreme Court issued orders in *Ward* and *Berry* to show cause before this court why relief should not be granted.

Each defendant was arrested for driving under the influence of alcohol. (Formerly Veh. Code §§ 23101, subd. (a), or 23102, subd. (a); now §§ 23153, subd. (a), or 23152, subd. (a), respectively). Each was asked to select any one of three blood alcohol level tests (breath, blood, or urine). Law enforcement officers urged the defendants

to select the breath test and each did select that test. The breath tests were conducted on an Omicron Intoxilyzer. Each defendant's breath registered an alcohol level of at least 0.10. No defendant was told that a breath sample would be saved.

The Legislature has established a presumption that a driver whose blood alcohol level is less than 0.05 percent is not under the influence of an alcoholic beverage. If the blood alcohol level is between 0.05 percent and 0.10 percent, no presumption arises. (Veh. Code, § 23155, subd. (a).) However, another statute provides "It is unlawful for any person who has a 0.10 percent or more, by weight, of alcohol in his or her blood to drive a vehicle upon a highway or upon other than a highway in areas which are open to the general public. . . ." (Veh. Code, § 23152, subd. (b).) Thus, the statute establishes guilt where chemical blood alcohol tests prove that the percent of alcohol is 0.10 percent or more, without any showing of actual impairment.

Given the importance of accurate determination of blood alcohol levels, and the greater convenience of breath testing as opposed to testing of blood or urine, the Legislature has directed the State Department of Health Services to establish, by regulation, procedures to be used by law enforcement agencies in administering breath tests for the purposes of determining the concentrations of alcohol in a person's blood. (Health & Saf. Code, § 436.52.) These regulations are contained in Title 17 of the California Administrative Code, sections 1220 et seq. Three of the breath testing devices which require discussion were approved by the Department of Health Services on December 20, 1979: the intoxilyzer, the breathalyzer, and

the intoximeter field crimper-indium tube encapsulation kit.

A brief description of the operation of the intoxilyzer follows: Prior to any test, the device is purged by pumping clean air through it until readings of 0.00 are obtained. The breath test requires a sample of "alveolar" (deep lung) air (Cal. Admin. Code, tit. 17, § 1219.3); to assure that such a sample is obtained, the subject is required to blow air into the intoxilyzer at a constant pressure for a period of several seconds. A breath sample is captured in the intoxilyzer's chamber and infrared light is used to sense the alcohol level. Two samples are taken, and the result of each is indicated on a printout card. The two tests must register within 0.02 of each other in order to be admissible in court. After each test, the chamber is purged with clean air and then checked for a reading of zero alcohol. (See *People v. Miller* (1975) 52 Cal. App. 3d 666, 668-669.) The machine is calibrated weekly, and the calibration results, as well as a portion of the calibration samples, are available to the defendant.

The breathalyzer operates on a completely different principle. (See *People v. Hitch* (1974) 12 Cal. 3d 641, 644.) To conduct a breathalyzer test, the breath sample is captured in a glass ampoule containing exactly three cubic centimeters of a chemical solution. If alcohol is present, it changes the translucency of the solution. The alcoholic content is then measured by shining a beam of light through the solution. The test ampoule and the test solution can then be retained for retesting by the defendant.

Finally, the operation of the intoximeter field crimper-indium tube encapsulation kit must be considered. This "kit" can be used in the field to collect a breath sample which is separate from the sample collected by the intoxilyzer. The device is independent from the breath testing devices and is in effect only a breath *collection* as opposed to a breath *testing* device. The subject blows into an indium tube which captures the breath sample. The indium tube is a soft metal device used to capture and preserve a breath specimen for later analysis. The tube originally is in a single piece but when the sample is blown into the tube, it can be crimped to hold the breath sample in three separate compartments. These containers can then be placed in a gas chromatograph (intoximeter) device which will test the sample for blood alcohol content. The gas chromatograph is an approved device for blood alcohol determination; the indium tube is approved for use with the gas chromatograph if the sample is tested within 14 days of collection. (Instruments Approved for Breath Alcohol Analysis, Dept. of Health, Dec. 20, 1979.)

The defendants contend that there are three grounds upon which this court should require suppression of the evidence obtained from the intoxilyzer tests: the duty of the prosecution to preserve evidence, equal protection, and requirements of informed consent. We deal only with the first ground.

The contention is that, under *People v. Hitch, supra*, 12 Cal.3d 641, the failure of law enforcement personnel to capture and preserve a retestable breath sample violated due process and rendered the intoxilyzer results inad-

missible. In *Hitch*, the Supreme Court held that a law enforcement agency conducting a chemical test for alcohol has a duty to preserve and disclose all material evidence which the agency has gathered. The court held that a due process violation occurred when the defendant's test specimen and test solution from a breathalyzer test were discarded. The defendant's eventual attempts to utilize discovery to verify independently the alcoholic content of the ampoule, to ascertain that exactly three centimeters of the solution had been used, and to examine the glass ampoule itself for any defects which would alter the alcohol reading were thus unfairly frustrated. (*Id.*, at pp. 649-650.)

The *Hitch* court, in considering the admissibility of "breathalyzer" results, determined initially that the results of the blood alcohol test "by their very nature constitute material evidence on the issue of guilt or innocence upon a charge of drunk driving." (*Id.*, 12 Cal.3d at p. 647.) The court held that the investigative agency involved in the test has a duty not only to disclose such material evidence but also to preserve it. Accordingly, the court stated that "where, as here, such evidence cannot be disclosed because of its intentional but nonmalicious destruction by the investigative officials, sanctions shall . . . be imposed for such nonpreservation and nondisclosure unless the prosecution can show that the governmental agencies involved have established, enforced and attempted in good faith to adhere to rigorous and systematic procedures designed to preserve the [evidence]. The prosecution shall bear the burden of demonstrating that such duty to preserve the [evidence] has been fulfilled." (*Id.*, at pp. 652-653.) If this burden is not met,

the results of the test are to be excluded at trial. Since the *Hitch* rule implements a federal due process standard, (*Id.*, at pp. 645, 646) it is unaffected by California Constitution, article I, section 28, subdivision (d). (See *Brosnahan v. Brown* (1982) 32 Cal.3d 236.)

In the present cases, it is conceded that no effort was made to capture breath specimens for later testing by the defense despite the availability of the indium tube encapsulation kit. Petitioners contend that the intoxilyzer evidence should therefore have been excluded from trial.

In denying many recent motions to exclude intoxilyzer results, many lower courts have relied on *People v. Miller*, *supra*, 52 Cal. App.3d 666. In *Miller*, the Court of Appeal examined "the question [of] whether the recent decision of the Supreme Court (*People v. Hitch*, 12 Cal.3d 641) should be extended to render inadmissible the results of all chemical tests of breath conducted by use of the 'Omicron Intoxilyzer.'" (*People v. Miller*, *supra*, 52 Cal.App.3d at p. 668.) The *Miller* court determined that "*Hitch* merely holds that evidence which the prosecution once possesses must be held. The test by intoxilyzer . . . may have 'gathered' evidence in the sense of placing the breath in the chamber, but it was not evidence of which the government could 'take possession.' The only element reducible to possession was the printout card, which has been preserved." (*Id.*, at pp. 669-670.) *Miller* may be factually distinguished in that there, no means had been shown by which to preserve a breath sample; the technology has now evolved so that such preservation is possible by use of the indium tube encapsulation kit. A new analysis is therefore in order.

Here, where the evidence has already been "collected" by the prosecution, the question is whether the specimen may be exhausted in testing without taking available steps to obtain and preserve another specimen for re-testing.

The Colorado Supreme Court, confronted with a record that was, like ours, "replete with evidence that a sample of the defendant's breath could have been preserved inexpensively and expediently" held that the "failure of the state to collect and preserve evidence, when those acts can be accomplished as a mere incident to a procedure routinely performed by state agents, is tantamount to suppression of that evidence. It is incumbent upon the state to employ regular procedures to preserve evidence which a state agent, in the regular performance of his duties, could reasonably foresee '“might” be “favorable” to the accused.’ (*Garcia v. Dist. Court*, 21st Jud. Dist. (Colo. 1979) 589 P.2d 924, 928, 929-930.) We are persuaded that the reasoning of the Colorado court is sound and that the same result should prevail in California.

In breath testing by means of the devices presently approved for use in California, the specimen actually tested cannot be retained. The indium tube, an approved device, can, however, be utilized to capture a contemporaneous specimen and preserve it for later testing. When an intoxilyzer is used, the law enforcement agency must employ rigorous and systematic procedures to ensure the preservation of the captured breath sample, or a contemporaneous similar sample, for testing by the defense unless there is a knowing waiver of that right. As with

Hitch, however, this holding will apply only prospectively to tests performed after this decision has become final with the exception that it will also be applicable to the cases now under review, including those not yet tried in which the present appeals must be dismissed.

It has been suggested that technology exists in the form of a device called "silica gel tubes" whereby the actual breath exhaled into the intoxilyzer could be retained. (See *People v. Riggs* (Colo. 1981) 635 P.2d 556, 558.) This attachment does not, however, appear on the list of breath testing instruments approved for use in California. Were this device to be approved by the Department of Health Services, it would, of course, provide another alternative method of complying with the *Hitch* requirements of evidence preservation. Law enforcement agencies are free to use their discretion to utilize whatever devices are available to meet this duty. Due process does not require the use of any particular instruments. It demands simply that where evidence is collected by the state, as it is with the intoxilyzer, the agencies must establish and follow rigorous and systematic procedures to preserve the captured evidence or its equivalent for the use of the defendant. (*People v. Hitch, supra*, 12 Cal.3d at pp. 652-653.)

The Trombetta and Cox groups of appeals are dismissed; in the Ward and Berry proceedings, writs of habeas corpus will issue granting new trials at which the intoxilyzer evidence will be excluded.

Certified for Publication.

POCHE, J.

I concur:

RATTIGAN, Acting P.J.

People v. Trombetta, (Cox, Ward & Berry)
A016358, A016374, A017265, A107266

I concur fully in the judgment and write separately only to emphasize that by this decision we do not prescribe or recommend any particular devices or procedures but hold simply that those before us in these cases do not satisfy the due process requirements of *People v. Hitch* (1974) 12 Cal.3d 641. In each case, the arresting officer urged the defendant to choose the breath rather than the blood or urine test but failed to inform him that as a consequence of this selection no sample would be retained. In none did the officer advise the driver of his right to preservation of a breath sample and obtain from him a waiver of that right. The Arizona Supreme Court has held that such a procedure is constitutionally adequate. (*Baca v. Smith* (1979) 604 P.2d 617, 618-620.) As no driver here gave a knowing and intelligent waiver of his right to preservation of evidence, that question is not reached here. Similarly, we do not consider here a situation in which police establish and diligently follow rigorous and systematic procedures for preservation of samples but circumstances beyond their control frustrate retention of a sample in a particular instance. As the majority opinion indicates, the core requirement of *Hitch* is establishment of and adherence to procedures which en-

sure fairness in the administration of field tests. The responsibility for designing those procedures lies with the Legislature and with state and local law enforcement agencies.

CHRISTIAN, J.

LAW OFFICES

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April 4, 1983
(Filed April 5, 1983)

Clifford C. Porter, Clerk
Court of Appeal
First Appellate District
350 McAllister Street, Room 4154
San Francisco, California 94102

Dear Sir:

RE: People v. Albert Walter Trombetta
and related cases
A016358
Sonoma County Superior Court No.: 209 C
Decision Filed March 28, 1983

As you know, this office represents Albert Walter Trombetta with regard to the above matter.

The purpose of this letter is to bring to the attention of the court an error in dates on page 4 of the decision. The decision at page 4 requiring correction reads as follows:

"Three of the breath testing devices which require discussion were approved by the Department of Health Services on December 20, 1979: the intoxilyzer, the breathalyzer, and the intoximeter field crimper-indium tube encapsulation kit."

In fact, the intoximeter field crimper-indium tube encapsulation kit was approved by the Department of Health on August 8, 1973. Also, various forms of the intoxilyzer and breathalyzer were also approved on the earlier date of 1973. The model of the intoxilyzer in question in the case of Trombetta was only approved in December of 1979 and that portion of the Court's opinion would be correct in that regard.

Defendant Trombetta's Exhibit "E" in evidence, together with the testimony set forth in the Reporter's Transcript at page 59 and 60, spells out the earlier date of approval of the intoximeter field crimper-indium tube encapsulation kit.

It is respectfully requested that you bring this clarification of dates to the Court's attention.

Very truly yours,

/s/ JOHN F. DEMEO

JFD/dh

CC: Honorable Lawrence G. Antolini
Judge, Municipal Court of the County of Sonoma
(#78402 TCP)

CC: John Van de Kamp, Attorney General
Attention: Charles R. B. Kirk, Esq.
Deputy Attorney General

CC: Ed Kuwatch, Esq.
CC: Scott A. Sugarman, Assistant Public Defender
County of Alameda
CC: J. Frederick Haley, Esq.
CC: Thomas R. Kenney, Esq.
CC: John Pettis, Esq.

III.

CERTIFIED FOR PUBLICATION
IN THE COURT OF APPEAL OF THE
STATE OF CALIFORNIA
FIRST APPELLATE DISTRICT
DIVISION FOUR
A016358 (Sonoma Sup. Ct. No. 209-C)

THE PEOPLE,
Plaintiff and Respondent,
v.

ALBERT WALTER TROMBETTA,
Defendant and Appellant.

A016374 (Sonoma Sup. Ct. No. 215-C)

THE PEOPLE,
Plaintiff and Respondent,
v.

MICHAEL GENE COX, et al.,
Defendants and Appellants.

A017265 1 Crim. 23779

In re GREGORY MOLLER WARD
on Habeas Corpus.

A017266 1 Crim. 22517

In re GALE BERNELL BERRY
on Habeas Corpus.

(Filed April 27, 1983)

THE COURT:

The majority opinion heretofore filed on March 28, 1983, has been substantially modified. For convenience, the entire opinion has been retyped to reflect those changes and is attached to this order.

The petitions for rehearing are hereby denied.

RATTIGAN, J.
RATTIGAN, Acting P.J.

CERTIFIED FOR PUBLICATION
SEE CONCURRING OPINION
IN THE COURT OF APPEAL OF THE
STATE OF CALIFORNIA
FIRST APPELLATE DISTRICT
DIVISION FOUR

No. A016358 (Sonoma Sup. Ct. No. 209-C)

THE PEOPLE,

Plaintiff and Respondent,

v.

ALBERT WALTER TROMBETTA,

Defendant and Appellant.

No. A016374, (Sonoma Sup. Ct. No. 215-C)

THE PEOPLE,

Plaintiff and Respondent,

v.

MICHAEL GENE COX, et al.,

Defendants and Appellants.

No. A017265, 1 Crim. 23779.

In re GREGORY MOLLER WARD
on Habeas Corpus.

No. A017266, 1 Crim. 22517.

In re GALE BERNELL BERRY
on Habeas Corpus.

(Filed April 27, 1983)

These cases arise, in diverse procedural settings, from misdemeanor prosecutions for driving under the influence of intoxicating liquor (formerly Veh. Code §§ 23101, subd. (a), or 23102, subd. (a); now §§23153, subd. (a), or 23152, subd. (a), respectively). The issue raised is whether intoxilyzer breath results are rendered inadmissible in a trial for driving under the influence of intoxicating liquor by virtue of the failure of law enforcement officials to preserve a retestable breath sample.

In each case the municipal court denied the defendant's common law motion to suppress the evidence ob-

tained from an intoxilyzer breath test. Each defendant then appealed to the superior court which affirmed the lower court order; the cases were then certified for transfer to this court. In the *Trombetta* and *Cox* groups of cases this court accepted transfer. It appears that *Trombetta* and its companion case have not proceeded to trial. The record does not indicate whether the cases in the *Cox* group have proceeded to trial; no judgment was entered in these cases.

An appeal may not be taken from a pretrial order of the municipal court. (Code Civ. Proc., § 904.2.) The correct procedure in *Trombetta* and *Cox* would therefore have been for the defendants to wait until a judgment was entered in the municipal court and then appeal that judgment. Because no appealable order was challenged in *Trombetta* or *Cox* those appeals should have been dismissed by the appellate department of the superior court. (*People v. Superior Court (Scott)* (1980) 112 Cal.App.3d 602, 606.)

In the *Ward* and *Berry* cases judgments of conviction were followed by superior court appeals; transfers to the Court of Appeal were whereupon those defendants petitioned the Supreme Court for writs of habeas corpus. The Supreme Court issued orders in *Ward* and *Berry* to show cause before this court why relief should not be granted.

Each defendant was arrested for driving under the influence of alcohol. (Formerly Veh. Code §§ 23101, subd. (a), or 23102, subd. (a); now §§ 23153, subd. (a), or 23152, subd. (a), respectively). Each was asked to select any one of three blood alcohol level tests (breath, blood, or

urine). Law enforcement officers urged the defendants to select the breath test and each did select that test. The breath tests were conducted on an Omicron Intoxilyzer. Each defendant's breath registered an alcohol level of at least 0.10. No defendant was told that a breath sample would be saved.

The Legislature has established a presumption that a driver whose blood alcohol level is less than 0.05 percent is not under the influence of an alcoholic beverage. If the blood alcohol level is between 0.05 percent and 0.10 percent, no presumption arises. (Veh. Code, § 23155, subd. (a).) However, another statute provides "It is unlawful for any person who has a 0.10 percent or more, by weight, of alcohol in his or her blood to drive a vehicle upon a highway or upon other than a highway in areas which are open to the general public. . . ." (Veh. Code, § 23152, subd. (b).) Thus, the statute establishes guilt where chemical blood alcohol tests prove that the percent of alcohol is 0.10 percent or more, without any showing of actual impairment.

Given the importance of accurate determination of blood alcohol levels, and the greater convenience of breath testing as opposed to testing of blood or urine, the Legislature has directed the State Department of Health Services to establish, by regulation, procedures to be used by law enforcement agencies in administering breath tests for the purposes of determining the concentrations of alcohol in a person's blood. (Health & Saf. Code, § 436.52.) These regulations are contained in title 17 of the California Administrative Code, sections 1220 et seq. Three of the breath testing devices which require discus-

sion had been approved by the Department of Health Services as of December 20, 1979: the intoxilyzer, the breathalyzer, and the intoximeter field crimper-indium tube encapsulation kit.

A brief description of the operation of the intoxilyzer follows: Prior to any test, the device is purged by pumping clean air through it until readings of 0.00 are obtained. The breath test requires a sample of "alveolar" (deep lung) air (Cal. Admin. Code, tit. 17, § 1219.3); to assure that such a sample is obtained, the subject is required to blow air into the intoxilyzer at a constant pressure for a period of several seconds. A breath sample is captured in the intoxilyzer's chamber and infrared light is used to sense the alcohol level. Two samples are taken, and the result of each is indicated on a printout card. The two tests must register within 0.02 of each other in order to be admissible in court. After each test, the chamber is purged with clean air and then checked for a reading of zero alcohol. (See *People v. Miller* (1975) 52 Cal.App.3d 666, 668-669.) The machine is calibrated weekly, and the calibration results, as well as a portion of the calibration samples, are available to the defendant.

The breathalyzer operates on a completely different principle. (See *People v. Hitch* (1974) 12 Cal.3d 641, 644.) To conduct a breathalyzer test, the breath sample is captured in a glass ampoule containing exactly three cubic centimeters of a chemical solution. If alcohol is present, it changes the translucency of the solution. The alcoholic content is then measured by shining a beam of light through the solution. The test ampoule and the test solution can then be retained for retesting by the defendant.

Finally, the operation of the intoximeter field crimper-indium tube encapsulation kit must be considered. This "kit" can be used in the field to collect a breath sample which is separate from the sample collected by the intoxilyzer. The device is independent from the breath testing devices and is in effect only a breath *collection* as opposed to a breath *testing* device. The subject blows into an indium tube which captures the breath sample. The indium tube is a soft metal device used to capture and preserve a breath specimen for later analysis. The tube originally is in a single piece but when the sample is blown into the tube, it can be crimped to hold the breath sample in three separate compartments. These containers can then be placed in a gas chromatograph (intoximeter) device which will test the sample for blood alcohol content. The gas chromatograph is an approved device for blood alcohol determination; the indium tube is approved for use with the gas chromatograph if the sample is tested within 14 days of collection. (Instruments Approved for Breath Alcohol Analysis, Dept. of Health, Dec. 20, 1979.)

Defendants contend that there are three grounds upon which this court should require suppression of the evidence obtained from the intoxilyzer tests: the duty of the prosecution to preserve evidence, equal protection, and requirements of informed consent. We deal only with the first ground.

The contention is that under *People v. Hitch, supra*, 12 Cal.3d 641, the failure of law enforcement personnel to capture and preserve a retestable breath sample violated due process and rendered the intoxilyzer results inadmissible. In *Hitch*, the Supreme Court held that a law

enforcement agency conducting a chemical test for alcohol has a duty to preserve and disclose all material evidence which the agency has gathered. The court held that a due process violation occurred when the defendant's test specimen and test solution from a breathalyzer test were discarded. The defendant's eventual attempts to utilize discovery to verify independently the alcohol content of the ampoule, to ascertain that exactly three centimeters of the solution had been used, and to examine the glass ampoule itself for any defects which would alter the alcohol reading were thus unfairly frustrated. (*Id.*, at pp. 649-650.)

The *Hitch* court, in considering the admissibility of "breathalyzer" results, determined initially that the results of the blood alcohol test "by their very nature constitute material evidence on the issue of guilt or innocence upon a charge of drunk driving." (*Id.*, 12 Cal.3d at p. 647.) The court held that the investigative agency involved in the test has a duty not only to disclose such material evidence but also to preserve it. Accordingly, the court stated that "where, as here, such evidence cannot be disclosed because of its intentional but nonmalicious destruction by the investigative officials, sanctions shall . . . be imposed for such nonpreservation and non-disclosure unless the prosecution can show that the governmental agencies involved have established, enforced and attempted in good faith to adhere to rigorous and systematic procedures designed to preserve the [evidence]. The prosecution shall bear the burden of demonstrating that such duty to preserve the [evidence] has been fulfilled." (*Id.*, at pp. 652-653.) If this burden is not met, the results of the test are to be excluded at

trial. Since the *Hitch* rule implements a federal due process standard, (*Id.*, at pp. 645, 646) it is unaffected by California Constitution, article 1, section 28, subdivision (d). (See *Brosnahan v. Brown* (1982) 32 Cal.3d 236.)

In the present cases, it is conceded that no effort was made to capture breath specimens for later testing by the defense. Defendants contend that the intoxilyzer evidence should therefore have been excluded from trial.

In denying many recent motions to exclude intoxilyzer results, many lower courts have relied on *People v. Miller*, *supra*, 52 Cal.App.3d 666. In *Miller*, the Court of Appeal examined "the question [of] whether the recent decision of the Supreme Court (*People v. Hitch*, 12 Cal.3d 641) should be extended to render inadmissible the results of all chemical tests of breath conducted by use of the 'Omicron Intoxilyzer.'" (*People v. Miller*, *supra*, 52 Cal.App.3d at p. 668.) The *Miller* court determined that "*Hitch* merely holds that evidence which the prosecution once possesses must be held. The test by intoxilyzer . . . may have 'gathered' evidence in the sense of placing the breath in the chamber, but it was not evidence of which the government could 'take possession.' The only element reducible to possession was the printout card, which has been preserved." (*Id.*, at pp. 669-670.)

We disagree fundamentally with the *Miller* characterization of what happens when a breath sample is taken. That is, in our view, such a taking is the collection of evidence within the *Hitch* rationale. The question then is whether the specimen may be exhausted in testing without taking available steps to obtain and preserve another specimen for retesting.

A similar situation confronted the Colorado Supreme Court in *Garcia v. Dist. Court, 21st Jud. Dist.* (Colo. 1979) 589 P.2d 924. Colorado, like California, uses urine, blood or breath tests for a determination of alcohol level, and samples of blood and urine "are customarily preserved for the use of the defense and to insure that the test is accurate." (At p. 926.) In further similarity to California, a presumption of driving under the influence arises from a certain level of alcohol in the blood. (*Ibid.*)

Two fact situations were before the *Garcia* court. In one, the breathalyzer tests and ampoules were destroyed in accordance with standard police procedures; in the other, the defendant was given a "Luckey Alco-Analyzer" breath test, which could not preserve a sample for testing. In both cases, the defendants' motions to suppress the results of the tests were denied.

Recognizing that in the first situation a sample of the defendant's breath "could have been preserved", and in the second other methods existed to preserve the defendant's breath, the court concluded: "The failure of the state to collect and preserve evidence, when those acts can be accomplished as a mere incident to a procedure routinely performed by state agents, is tantamount to suppression of that evidence." (At pp. 929-930.) "We hold, therefore, that in all cases where a defendant elects to submit to a breath test to determine his blood alcohol level, he must be given a separate sample of his breath at the time of the test or the alcoholic contents of his breath in a manner which will permit scientifically reliable independent testing by the defendant, if that test is to be used as evidence. [Citations.]" (At p. 930.)

We are persuaded that the reasoning of the Colorado court — paralleling the *Hitch* rationale — is sound and that the same result should prevail in California. Due process demands simply that where evidence is collected by the state, as it is with the intoxilyzer, or any other breath testing device, law enforcement agencies must establish and follow rigorous and systematic procedures to preserve the captured evidence or its equivalent for the use of the defendant. (*People v. Hitch, supra*, 12 Cal.3d at pp. 652-653.)

With the exception of the cases reviewed in this decision (i.e., A016358, A016374, A017265, A017266) this holding will apply prospectively only to tests performed after this decision has become final. Although we place primary reliance upon *People v. Hitch, supra*, 12 Cal.3d 641, it may reasonably be presumed that law enforcement activities in breath testing have been performed in good faith reliance upon *People v. Miller, supra*, 52 Cal.App.3d 666, which, as we have noted, reached a conclusion contrary to our holding today.

The Trombetta and Cox groups of appeals are dismissed; in the Ward and Berry proceedings, writs of habeas corpus will issue granting new trials at which the intoxilyzer evidence will be excluded.

Certified for Publication.

POCHE, J.

I concur:

RATTIGAN, Acting P.J.

People v. Trombetta, (Cox, Ward & Berry)
A016358, A016374, A017265, A107266

I concur fully in the judgment and write separately only to emphasize that by this decision we do not prescribe or recommend any particular devices or procedures but hold simply that those before us in these cases do not satisfy the due process requirements of *People v. Hitch* (1974) 12 Cal.3d 641. In each case, the arresting officer urged the defendant to choose the breath rather than the blood or urine test but failed to inform him that as a consequence of this selection no sample would be retained. In none did the officer advise the driver of his right to preservation of a breath sample and obtain from him a waiver of that right. The Arizona Supreme Court has held that such a procedure is constitutionally adequate. (*Baca v. Smith* (1979) 604 P.2d 617, 618-620). As no driver here gave a knowing and intelligent waiver of his right to preservation of evidence, that question is not reached here. Similarly, we do not consider here a situation in which police establish and diligently follow rigorous and systematic procedures for preservation of samples but circumstances beyond their control frustrate retention of a sample in a particular instance. As the majority opinion indicates, the core requirement of *Hitch* is establishment of and adherence to procedures which ensure fairness in the administration of field tests. The responsibility for designing those procedures lies with the Legislature and with state and local law enforcement agencies.

Christian, J.

IV

MUNICIPAL COURT OF CALIFORNIA,
COUNTY OF SONOMA

DEPARTMENT NO. 3

BEFORE:
HONORABLE LAWRENCE G. ANTOLINI, JUDGE

No. 78402 TCR
78532 TCR
Charge: 23102a VC
23102a VC w/1 prior

THE PEOPLE OF THE STATE OF CALIFORNIA,
Plaintiff,

-vs-

MELINDA BERTRAM and
ALBERT TROMBETTA,
Defendants.

REPORTER'S TRANSCRIPT
OF
HITCH MOTION

April 30, 1981

Reported by:
BRENDA B. KRAEGER
C.S.R. No. 1896

APPEARANCES

For the People: MARK TANSIL, Esquire
Deputy District Attorney
County of Sonoma

For the Defendants: JOHN F. DeMEO, Esquire
Attorney at Law
1022 Mendocino Avenue
Santa Rosa, California 95401

(page 4) MR. TANSIL: Basically, we're the responding party. The only thing I would bring up is that I believe both sides will stipulate that the Court's ruling on the constitutional issues that are being raised by the moving party would bind both sides at trial should this proceed to trial, both cases (page 5) proceed to trial.

THE COURT: This is stipulated then to be in essence the trial motion?

MR. DE MEO: Yes. In that regard, your Honor, there will be other stipulations offered shortly.

THE COURT: Very well. That stipulation is acceptable to the Court, and gentlemen, if there's any other stipulation—

. . .

(page 6) THE COURT: If I could stop you just for a moment. That brings up a point that does concern me. As far as the vehicle, and I would hope we could get a stipulation as to this—I'm quite concerned that a 1538.5 may not well be a proper manner to bring this before the Court. Is there a stipulation as to that? I would deem it in essence stipulated when this is deemed to be the pre-trial motion, it would be a proper vehicle.

MR. TRANSIL: The People in indicating that we are willing to stipulate to the ruling on the constitutional is-

sues being binding on the trial court, we would agree a 1538.5 motion as was argued in our brief is not an appropriate vehicle. This is not a search and seizure issue per se, but we are willing for convenience to the trial court to stipulate that your ruling now will bind both of us at trial on both of these cases on the constitutional issues that have been raised by Mr. De Meo in his brief.

THE COURT: Very well. Is that stipulation acceptable?

MR. DE MEO: Certainly in that regard *People versus Scott*, which we did cite clearly indicates that there is a common law pre-trial motion to suppress, so I think it's probably moot.

(page 7) THE COURT: It's the Court's feeling, just to share this with you, that 1538 is not the proper vehicle but with that stipulation, because I really want to get by this quickly. It's a moot point, so, very well.

• • •

(page 33) MR. DE MEO: I'll staple the whole package together. That would be easier.

Finally, in the way of an offer to stipulate which was filed with our notice of motion some time ago, it is my understanding that there will be some affirmative responses to our offer to stipulate. Namely, that in both cases it would be stipulated that both defendants were administered breath tests indicated in this offer to stipulate, namely, January 31, 1981, as to Mr. Trombetta, and February 1, 1981, as to Mrs. Bertram; in that the instru-

ment used was the Intoxilyzer machine model 4011 AW, and that this occurred at the Sonoma County jail, Santa Rosa, California. That's (page 34) stipulated to, is it not?

MR. TANSIL: That's correct.

MR. DE MEO: It is my further understanding that in both cases it would be stipulated that at no time prior to or after the Intoxilyzer tests were administered to either of these defendants did any law enforcement or peace officer advise either of them verbally or in writing that there would be no sample of his or her breath preserved for retesting or for any purpose.

MR. TANSIL: That's also stipulated to.

MR. DE MEO: In other words, that there was no warning before or after to either defendant. It's my further understanding then in both cases it would be stipulated that at the time of the collection of the sample on the Intoxilyzer, that there was and is and has been available a device which is approved by the Department of Health in the State of California for the collection of a breath sample for later testing. And in regard to that stipulation, it would also be stipulated that this does not foreclose us from calling our expert to expand on that particular point. Is that also correct?

MR. TANSIL: Well, that may have to be modified just a bit. I believe he said at the time that breath was

collected on the Intoxilyzer. I'm not sure what Mr. De Meo means by "collection" now that he's been arguing some. I would say at the time the Intoxilyzer machine was used at the time on Bertram and Trombetta.

THE COURT: The Court's not clear and it's a question (page 35) I'm quite concerned about. The use available. Does that mean—you mean in the State of California or do you mean that if the defendant had requested that machine to be used rather than the—whatever, the 4011 AW Intoxilyzer, that it could have been used at that time? What is meant by "available"?

MR. DE MEO: Well, by available I don't think that Mr. Tansil means to imply that they had one sitting in there. I don't know whether they did or not, but they're in the County of Sonoma, City of Santa Rosa, State of California, all over the place. Whether there was one right there at that moment, I'm not prepared to say whether there was or wasn't, but I don't think you meant to imply there was.

MR. TANSIL: No. I think the availability comment would be were the State required to take a separate breath sample for retesting for the defendant that there is a device, the Indium Tube, which goes under that longer name, which could be obtained by the State for use in the county. Not that it was necessarily sitting right in the room where the Intoxilyzer machine was being used, but in a technical sense the State could get that off the market and use it were it required to do so by the constitution.

THE COURT: My understanding—this is an aside, although it's obvious, but since it's on my mind, I want to speak it. In the *Kansas case* cited by the People, was

there not — was it not stated that there was a separate test available for her use at that time if she so requested it or am I —

MR. DE MEO: In the *Kansas case* — no, your Honor, in (page 36) *Kansas* they used the Intoximeter Field Crimper Indium Tube Encapsulation Kit, and what they do, it makes three samples. But in *Kansas*, a rather parochial, conservative state, what they do is they use all three. The People uses all three of the tests, so there's none left unless they run another three, but they do it there. The Kansas Highway Patrol uses that system and also that — interesting you mentioned that case. It points out that they have no duty by statute in Kansas to advise the defendant that he has a choice or what the consequences are of a refusal. The case points that out, which is quite interesting.

MR. TANSIL: If we could get back to the stipulation.

THE COURT: Mr. Tansil, I'll run the court and you just make objections and we'll know where we are.

MR. DE MEO: I guess we were at that stipulation concerning that there was an approved available device for the collection and/or whatever you want to refer to it as taking of a breath sample for later testing at this particular time and there had been such —

MR. TANSIL: That's correct, your Honor. Not necessarily available in the room where the Intoxilyzer machine was being used, but on the market and available to the State if it were required to use that as a second test.

THE COURT: With that clarification, that stipulation will be accepted.

MR. DE MEO: Thank you, your Honor. It's my understanding also, in both cases it would be stipulated there was no breath sample collected for subsequent, later analysis on (page 37) either defendant in these cases. Is that correct?

MR. TANSIL: That would be correct. There was no use of the Indium Tube, which I believe would be the only approved device for collecting a sample for later retesting.

THE COURT: That will also be accepted then by the Court.

MR. DE MEO: Yes, your Honor. And it's my further understanding that it would be stipulated to—I think we've already covered this—that the ruling of the Court subject to all proper appellate review would be binding on the People and these defendants at the time of trial.

MR. TANSIL: So stipulate, your Honor.

THE COURT: That stipulation, also, then will be accepted by the Court.

• • •

(page 38) DONALD MURRAY, produced as a witness on behalf of the Defendants, having been first duly and regularly sworn by the Clerk to testify the truth, the whole truth and nothing but the truth, testified as follows, to wit:

Direct Examination

BY MR. DE MEO:

Q. Good morning, Mr. Murray.

A. How do you do, sir.

Q. Would you please state your full name and your address?

A. Donald D. Murray, 1011 Ignacio Valley Road, Walnut Creek, California.

Q. And Mr. Murray, would you relate to the Court what your occupation is?

A. Present time I'm a forensic consultant in alcohol cases and instrumentation.

Q. Would you tell us what type of instrumentation you're referring to?

A. Breath equipment to test for alcohol.

Q. Are you licensed by the State of California as a clinical laboratory technologist?

A. Yes, sir, I am.

Q. In that regard, are you required to take and pass an (page 39) examination administered by the State of California as a prerequisite to licensing as such?

A. Yes, I did in 1948.

Q. Did you take and pass that test?

A. Yes, sir.

Q. Can you tell us generally what you are authorized and qualified to do as a licensed clinical laboratory technologist?

A. Clinical laboratory technologist is one who would do tests of body fluids and vapors and tissues to detect the absence or presence of disease or health.

Q. All right. Have you ever been registered as a medical technologist?

A. Yes. I'm registered in 1948 with the American Medical Technologist National Registry.

Q. All right. And what is required, if anything, as a prerequisite to recognition as a member of the American Medical Technologists?

A. Well, you have to be proficient in the field. A certain number of years of experience in clinical laboratory work and then pass a written examination, written and oral in some cases.

Q. Did you actually take and pass an examination to be certified?

A. Yes, I did.

Q. What is the purpose and function of the American Medical Technologists? In other words, what are you qualified to do as such?

A. Well, again this would be — National Registry is used in (page 40) many states all over the United States. Back when I started, they didn't have license laws, so if one were registered nationally, he could function as a clinical laboratory technologist in hospitals, clinics, wherever, doing the same thing that I formerly stated, testing for the presence or absence of disease with body fluids and vapors.

Q. All right. And is there an American society of medical technologists?

A. Yes, there is.

Q. Did you ever belong to that?

A. Yes.

Q. What is its purpose?

A. It's similar. They're all about the same.

Q. Mr. Murray, have you ever been certified by the State of California as a forensic alcohol analyst?

A. Yes, I was.

Q. When, sir?

A. Let me check. Here in 1971.

Q. And were you required to take and pass an examination to qualify to be certified by the State?

A. Yes.

Q. And did you take and pass such a test?

A. Yes, I did.

Q. Can you tell us what certification as a forensic alcohol analyst qualified you to do?

A. One who is certified as a forensic alcohol analyst could work in a forensic alcohol laboratory performing any of the tests there that are used in court on either blood, breath or (page 41) urine specimens.

Q. Are those the three types of fluids or vapors that you were qualified and certified to collect for forensic analysis?

A. That's correct.

Q. As you have indicated, you must be associated with a State certified forensic laboratory in connection

with your capacity as a forensic alcohol analyst; is that correct?

A. Yes, sir, that's true.

Q. And what lab were you associated with in that regard?

A. Ultrachem Laboratory in Walnut Creek.

Q. For what period of time were you associated in that capacity with them?

A. Well, from the time in 1971 until March 16th of 1980 when I terminated there.

Q. And at that time did the Department of Justice then open their own laboratory in Contra Costa County?

A. It wasn't the Department of Justice, sir. It was the Contra Costa County Criminalistic Laboratory that set up and took over the work we were doing.

Q. I see. During the time that you were associated with Ultrachem, what, if any, official associate or capacity did Ultrachem have with the County of Contra Costa relative to forensic alcohol analysis?

MR. TANSIL: Objection; irrelevant.

THE COURT: Overruled.

THE WITNESS: During the time I was there and even long prior to that the — the laboratory, Ultrachem, contracted to do the testing for the county, the type that the crime lab (page 42) is doing now in all of the county except the Richmond area.

Q. Did that testing include the blood, breath and urine collections and analysis for law enforcement in the

Contra Costa County other than that one area you have indicated?

A. Yes, it did.

Q. You have indicated that Ultrachem no longer functioned in that capacity after March of 1980 by virtue of the county taking over a forensic lab of its own; is that correct?

A. Yes, that's right.

Q. And did you function as a forensic alcohol analyst for the Ultrachem Lab in 1971 through 1980 in March?

A. That's right. I did.

Q. Can you give us an approximation of how many samples of blood you personally collected from suspects charged while driving under the influence or other alcohol related crimes in your capacity at Ultrachem as a forensic alcohol analyst?

A. Yes, sir. At the time I left, I had tested, personally tested 14,371 individuals over about nine years and I would estimate that about half of those were blood and the other half were breath or breath and urine or in some cases all three. Some years back we used to give a subject — we do all three tests if he wanted it at the same setting.

Q. With regard to the breath samples, can you give us an approximation of about how many of those you personally collected from suspects charged with driving under the influence of alcohol or alcohol related crimes?

A. Well, since about half of the people I tested were breath and this is an estimation, but it's quite — pretty close (page 43) then I would say that I have tested over 14,000 breath tests since I did two tests on each individual during that time.

Q. Can you tell us, Mr. Murray, what types of equipment you became familiar with by study or experience in the collecting and testing for breath alcohol analysis?

A. Well, I'm familiar with the machines that are approved by the State. That includes the Intoxilyzer. This is the infra-red device that's used and the Intoximeter. It's the Gas chromatograph instrument that's used and the Breathalyzer and also the Indium Tube crimping device which is an accessory or it can be used independently, either one, but it's an accessory to the Intoximeter.

. . .

(page 58) Q. Now, Mr. Murray, have you ever qualified as an expert in court on the subject of forensic alcohol analysis and instrumentation pertaining to alcohol analysis?

A. In courts?

Q. Yes, sir.

A. Yes. I've qualified 465 times, I believe, now in the last nine years.

Q. In what counties?

A. Santa Clara County, Alameda County, San Mateo County, Contra Costa County, and I'm not sure about

Sacramento. I went up there. I don't think I got on the stand though, a couple of times.

Q. In both Muni and Superior Courts?

A. Yes, sir.

Q. And the total number of times you've testified as an expert on this subject or how many, roughly?

A. As an expert, 465 times so far.

(page 59) Q. And how many times were you called as a witness by and for prosecution in those number of occasions?

A. All of them except about 15, I believe.

. . .

Q. Mr. Murray, I'd like to direct your attention to the Department of Health approvals of instruments, and in that regard, to your knowledge, does the State of California require that before any instruments purporting to be capable for breath alcohol analysis be approved in advance before it can be used as such?

A. Yes. The State has this requirement, right.

Q. You're familiar with that list, are you not?

A. Yes, sir.

Q. And with regard to those particular lists, are the following instruments approved for use in California for breath alcohol analysis of the Intoximeter Field Crimper Indium Tube Encapsulation kit, is that one that's approved?

A. The kit is approved and so is the crimper, yes.

Q. For how long?

(page 60) A. How long has it been approved?

Q. Yes.

A. Since 1973.

Q. And the primary attribute of that particular device is what?

A. It has the capacity to collect and preserve a breath sample for later analysis.

Q. Can it be collected in the field with this instrument?

A. Yes, it can. The instrument is designed where you can plug it in and take it out in your car. An officer, for instance, could collect out in the field with it.

Q. All right. Can it be used in a stationary location in a room?

A. We use the—hundreds of times, I would say. Maybe a thousand, but in that situation, yes.

Q. Is it necessary to plug the crimper into an outlet? If so, what kind of an outlet?

A. Yes. Wherever you're at, you have to keep it warm, so if you're in a car, you plug it into your dashboard and if you're in a room, into 110.

Q. Is the gas chromatograph Intoximeter Mark II model and Mark IV model also approved by the State of California?

A. Yes, they are.

Q. And how long have those instruments been approved by the State?

A. Since 1971.

Q. We've talked about the gas chromatograph Intoximeter capacity for being specific for ethanol. Now, on another (page 61) subject can it be used in conjunction with any other instrument? This is the GC Intoximeter.

A. Well, I don't quite understand that question.

Q. We first talked about the Intoximeter Field Crimper Encapsulation kit.

A. Yes.

Q. What do you do with that sample when you get a sample from the Field Crimper Encapsulation kit? Is there another instrument that can test that preserved sample?

A. Yes. If you're going to run the kit, the little Indium Tube kit, then you would most likely use the Intoximeter. It's designed to do that test. And if you're in a forensic lab and you were using this in a forensic program, you would be required by State law to use that Intoximeter to do the test. However, the defense doesn't have that kind of requirement. He can test it any way he wants to.

Q. But as far as at least the People are concerned, the GC Intoximeter is approved for use in testing what is collected by the Field Crimper Encapsulation kit?

A. Yes, it is, sir.

• • •

(page 62) Q. The Intoxilyzer machine then without further modification does not preserve a breath sample for later or subsequent testing, does it?

A. No. I don't know anybody that's doing that.

Q. All right. Now, they only collect them for immediate analysis and then the machine dissipates the sample taken into (page 63) the room, does it not?

• • •

Q. Now, to your knowledge and from your study and review of the approval sheets that the State sends out, the finding which machines are approved for use for forensic alcohol analysis, do those approval sheets including the one on the Intoxilyzer machine in this case speak in terms of collecting, the word collecting breath samples for analysis?

A. That's right. They use the term "collect."

Q. Now, I'd like to direct your attention at this time to the subject of the Indium Crimper in that device. Now, we've talked about the fact that there is such a device; that it's been approved by the State since 1973. I'd like to ask you is it and has it been available for purchase in the State of California since the time it was approved in 1973?

A. Yes, it is.

Q. Do you know from whom it is obtainable and has been obtainable for that period of time?

A. Yes, Cal-detect Corporation in Richmond manufactures and distributes that.

Q. Are you aware of the present cost of the crimper device?

A. I believe they're around \$200 right now.

(page 64) Q. Can that device be used over and over and over again?

A. Yes.

Q. In other words, you don't use that device once and throw it away, do you?

A. No, sir.

Q. Now, that particular device functions in conjunction with a kit, does it not?

A. That's correct.

Q. And to your knowledge, are these kits available and have they been available for purchase since the time the crimper was approved in California?

A. Yes. They're readily available.

Q. And do you know what the approximate cost is for each capsulation kit that is used in conjunction with the crimper?

A. Yes. If you buy them singly, the price has just gone up to \$13.90. I just bought two of them.

Q. That would be for each kit; is that right?

A. At the single price, yes. If you bought a thousand, you might get a little reduction, but the latest price is \$13.90 for each test kit.

Q. And routinely, would you use one of those kits on each suspected individual?

A. Yes. If you were saving, you would use one kit to save three samples.

Q. All right. To your knowledge, is there any scarcity of these kits?

A. There's no scarcity at all.

Q. By the way, in this encapsulation kit, what is the metal (page 65) that's used for purpose of housing the breath sample?

A. Indium.

Q. And is Indium recyclable?

A. Yes.

Q. In other words, after you're through with it, can you turn it back to the company and they can remold it?

A. Right.

MR. TANSIL: Objection; irrelevant.

THE COURT: Overruled.

THE WITNESS: Yes. Yes, you can. They pay you for the Indium itself and they re-use it.

BY MR. DE MEO:

Q. Now, did you at my request bring with you an Intoximeter Field Crimper and a kit?

A. Yes, sir.

Q. And in your opinion would it be helpful to the Court and counsel to demonstrate how that instrument functions?

A. It's very simple and I think it would be.

Q. All right. Let me ask you this before you get into it. Have you taught the use of this device by law enforcement people?

A. Yes. Our lab has taught and I have assisted in that.

THE COURT: May I ask this: At whose request did you do that teaching, the use of the device, what agency?

THE WITNESS: We had set up Concord Police Department with their own instrument and our lab was the forensic lab for them for some years and they were using the Intoximeter like we were and they did the same thing we did. They (page 66) collected these samples so it's Mr. Stagley set up the—taught them mostly all at one time on weekends and when he's on vacation I had to take over there. Every now and then we get an officer and I'd have to show him how to do it.

MR. TANSIL: Your Honor, I would object at this point to relevance. This is not a hearing or trial and some factual issue, although it is a legal issue as to whether the State has to use a device like this, I don't think any general description of the device itself is going to benefit the Court. The issue is whether the device has to be used, period, as a legal matter.

THE COURT: Mr. De Meo?

MR. DE MEO: Your Honor, I would respond to that by saying we're talking about the constitutional rights of an individual accused of a crime and I think when the Court sees and the record indicates how simple it is for this device to be utilized and the ease with which it can be utilized and the minimal cost that it's certainly relevant on the question.

THE COURT: Let me ask you this, Mr. Tansil: Will the People stipulate what was just stated; that is, the People stipulate the crimping device and the kit together with the actual crimping device are accessible? They are very simple to use and so forth. Is there any argument on that?

MR. TANSIL: I have no argument as long as we're talking about using the crimping device as Mr. Curry did in the declaration that's already come in separate and apart from the intoxilyzer machine. To that extent, I would stipulate (page 67) it's on the market. It sells for prices as indicated and could be obtained by the State, if required to do so.

THE COURT: Now, there is one comment you made I want to comment on. You said separate from the Intoxilyzer machine that's presently in use. It's the Court's understanding that the crimping device is separate from the Intoxilyzer, completely different unit. It can be used quite easily, but it must be purchased. In other words, the intoxilyzers as they presently exist there is not a kit that could be put onto the Intoxilyzer. In other words, to act as a crimping device; in other words, for \$13 just already using the existing Intoxilyzer. At least that's my understanding.

MR. DE MEO: That's correct. In fact, we were going to go into that specific subject at some point here. That's right. The Indium Crimper and this Encapsulation kit is not designed to be used with the Intoxilyzer, but it is designed to be used with the GC Intoximeter Mark II or Mark IV machine.

MR. TANSIL: I'm in full agreement that would be a process that could be followed if required by law.

MR. DE MEO: Also, I think we need a stipulation that this Intoximeter Field Crimper may be utilized by itself in collection of a breath sample. It can be in the field. It can be at the county jail, the police department, wherever you might choose to collect a sample. That kit and that machinery, that instrument may be used anywhere in and of itself and is so authorized to be used.

THE COURT: Once again I see no problem.

MR. TANSIL: No objection as long as it's understood (page 68) that crimping device doesn't do the testing. All it does is capture the breath sample which will be tested on another device.

THE COURT: The crimping device is what actually is used for testing and the kit is what preserves the three samples, if I'm keeping up with the testimony.

MR. DE MEO: That's correct.

THE COURT: You stipulate then to that?

MR. TANSIL: Yes, your Honor. I believe I would.

• • •

(page 69) THE COURT: The Court's clear it appears to be by stipulation that there is an alternative method of testing available to the State of California that is—would appear to be financially feasible to use and also is in essence from a realistic standpoint available. I believe those would be the Points you'd be trying to make, would they not?

MR. DE MEO: Yes, your Honor.

THE COURT: And the People stipulate to this; is that correct, Mr. Tansil? Did you hear what I said or were you —

MR. TANSIL: I'm sorry. I missed that. Would you read that?

(Record read.)

MR. TANSIL: Yes, your Honor. I think that is correct.

. . .

Q. Mr. Murray, I'd like to now direct your attention to the time within which the collected samples may be accurately tested in using this Intoximeter Field Crimper device. All (page 70) right?

A. Yes, sir.

. . .

(page 71) Q. Have you made such a study as to how long a period of time must pass and the integrity of the sample would still be good? Have you made such a study?

A. Right. I've studied the literature on it, talked to many people.

Q. And in your opinion, Mr. Murray, with regard to the literature that you've studied, do you regard them in your opinion as authoritative in the field of science?

A. That's right.

Q. And what were some of the studies and sources that you referred to concerning the subject of the integrity of the sample and the timing of the test?

A. One of the studies that I considered quite important is a late study in 1978 by the Canadian Royal Mounted Police. (page 72) Mr. Comeau, who is their chief forensic specialist up there, has written up that the tubes last up to 90 days with no trouble at all. They did a lot of work on that. And I have a copy of that here, if you want to see it.

Q. Any other tests? Any other studies that you —

A. We have sent them off from our own lab and we don't have any problem even up to a year. I don't know of any studies that go beyond 90 days, actually, where somebody studied this problem to determine that, but there are plenty of tests that we have sent off where the breath would relate to a blood that was taken at the same time up to a year.

Q. In other words, you would have a test study, an actual blood to compare with what the breath was by later analysis and they would correlate favorably and accurately; is that right?

A. Yes. We used to have quite a few like that where we do have blood, but we also in many cases had a breath test itself and then a sample was saved where the correlation was good after a year's time or up to—generally up to a year in most of these studies. There are very few people that test them after a year. There have been some rare cases and no one I know wants to study a thing that doesn't matter.

Q. Now, Mr. Murray, what is your opinion after studying these investigations and in your own experience based on reasonable scientific probability as to the period of time that these samples of breath collected by the device we're talking about, the crimping device and kit, what period they would retain their integrity for breath alcohol analysis?

(page 73) A. I'm quite sure that we could count on them for 90 days and probably up to a year.

. . .

Q. Would you tell us — well, actually, I guess that document that's in evidence on the approval says no more than 14 days shall elapse between the time a sample is captured by the Intoximeter Field Crimper Indium Tube Encapsulation kit and the time that sample is analyzed in gas chromatographic Intoximeter Mark II or Mark IV. You're familiar with that statement?

A. Yes.

Q. Would you explain to the Court how this 14-day requirement has been interpreted by the forensic alcohol supervisors, the labs and the analysts?

A. Well, the people I know interpret it to mean that if you're going to capture a breath like that, you have to test it before 14 days. In other words, you don't leave it in the trunk of your car if you happen to be up in the mountains someplace, an officer capturing a breath and bring it in three weeks later. That's what it means. It means you have to test it. This is acknowledged in forensic testing when you're testing for the police before 14 days elapsed. It has nothing to do with defense testing.

. . .

(page 74) Q. We were talking about temperature. Does it make any (page 75) difference to the integrity of the later testing as to what temperature or where this particular indium tube is stored in the meantime?

A. The tests that I've referred to, for one, they did test under refrigeration and at high temperature and it didn't seem to make any difference.

. . .

Q. Let me ask it again and don't answer it until Mr. Tansil objects.

Is the gas chromatograph Intoximeter the only instrument approved in the State which is specific for ethanol and not other substances?

. . .

(page 77) Q. Mr. Murray, I don't know whether you have the question.

A. I remember this one.

Q. All right.

A. Yes, it's the only instrument that I know of that is specific for ethanol.

Q. And that particular gas chromatograph instrument is manufactured right here in California you said?

A. Yes, it is.

Q. And do you know whether any forensic lab has one of these instruments in this particular County of Sonoma?

A. Yes. Jerry Curry's lab over here has had one for many years. Still has one here in this county.

Q. You're familiar with the Central Pathology Lab?

A. That's right. Have known them for years.

Q. To your knowledge, do they have qualified people there to operate and analyze breath tests on their gas chromatograph Intoximeter?

A. Right. Mr. Claus, who was over there who is the fellow that I trained up in Eureka when he first came to California. I know him quite well. He's well qualified in this field. So is Mr. Curry. I don't know who else he might have now.

. . .

(page 79) Q. Now, Mr. Murray, regarding all of these instruments we've talked about that collect and analyze breath samples for alcohol content, in your opinion are any of these instruments that the State has approved for breath alcohol analysis perfect and infallible?

A. None of them are.

Q. Do you have an opinion as what the most reliable test there is for alcohol analysis of an individual? In other words, of the three, the blood, breath or urine.

A. Yes. The most reliable will be blood tests that were measured on a gas chromatograph device.

. . .

Q. Mr. Murray, you told us that you have conducted some experiments with the Intoxilyzer machine. What was the purpose for which you conducted those experiments? What was it you were trying to determine or not determine?

A. Well, just demonstrating — I don't know which experiments you mean now. You mean recent experiments?

(page 80) Q. For specificity of the machine.

A. Going back to when Dr. Shear and I evaluated it some years ago — which are you referring to or do you want me to —

Q. I just want you to encapsulate for us, first, the purpose for which you did these tests and what your findings were.

A. Okay. We were testing specificity. In other words, we wanted to find out if — how specific it was. We knew that theoretically it's not specific for ethanol. The manufacturer admits that. What we wanted to see with our own eyes — but we wanted to see with our own eyes and we wanted to see if we took six common solvents that are found in foods, in the body or in the laboratory and run them through there, would they — would the instrument react, and it did.

Q. When you say "would it react," would you be more specific about that?

A. Well, if you run, for instance — it will react to ethanol. It's got the carbon hydrogen functional group at 3.39 wave lengths will react on this machine. You get a reading with ethanol. It will also react with acetone at that same wave length. It will also react with butane, gas from your lighter. It reacts with isopropyl alcohol. It reacts with the ingredients in gasoline, heptane and octane. It reacts with methanol and there are — these are some that I ran through, if you're talking about a quick

experiment. I've run others, but these are paramount that I recall.

Q. All right. For example, if I'm following you, if you had a large amount of acetone in your breath or if you had ingested — inhaled butane from a leaking cigarette lighter (page 81) and blew into that, you would get a reaction on the machine and would read out a level; is that right?

A. Yes. It would all read out as alcohol on that particular machine.

Q. It wouldn't, say, wait a minute, this is part acetone and part gasoline and part butane and only this much alcohol; is that right?

A. That's the problem, right. It doesn't do that. It calls everything alcohol, if you're going to say that's what you're measuring with it.

Q. Now, if we were to assume that an individual had a reading on the Intoxilyzer which was in excess of .10 and that a substantial contribution to that read-out above .10 was of heptane fumes on the clothing or a leaking lighter or someone who had a lot of acetone on their breath, that particular Intoxilyzer machine wouldn't tell you what was what; would it?

A. No, it wouldn't.

Q. Now, if we had a separate substantially similar breath collected by this Intoximeter Field Crimper and we ran that test with the same substances in it that was run on the Intoxilyzer through the gas chromatograph, what would the gas chromatograph do that the Intoxilyzer couldn't do?

A. It would give a true reading of what alcohol may have been in that sample of breath. It would also, and if you wish, tell you which contaminant may or may not be present.

Q. In other words, it would break out on the gas chromatograph how much, what quantity of alcohol it was as opposed (page 82) to all of these other things that may have distorted the Intoxilyzer; is that correct?

A. Right.

Q. Now, Mr. Murray, based on the present state of the art, or let's say the science, is it scientifically possible to collect and preserve a breath sample from a suspect by use of the omnicron Intoxilyzers, the ones they're using here?

A. Yes. It would be very simple to do that, if we can get them to do it.

Q. Can you explain how that could be done?

A. Well, just like the machine I have has a little port there so you can do this. And the reason it has a port — it's on the side. There's a little port where you can bring the exhaust tube out.

Q. What machine are we talking about?

A. I'm talking about the 4011a model that we recently bought from Dr. Harlow. This is set up the same way they use in Colorado. You just take a little silica gel tube like this and then when you get your second test, the breath, instead of purging it into the room, you remove this and put that into the tube and then run that 600 cc through the silica gel. And that will preserve whatever vapors are in there, whether it's alcohol, acetone, any va-

por. This is a very well accepted method of preserving vapors, collecting them. That is, it collects them.

Q. How long has that method been around, the silica gel method of collecting, years?

A. I don't know how long. Many, many years. We use it in (page 83) refrigerators. This type of tube is used to get vapors out of the room in the refrigerators. That's used in the column. Silica gel has been around a long time. It's a well accepted technique for capturing vapors, gases.

Q. To your knowledge, is that technique used with the Intoxilyzer in the State of Colorado to preserve samples of breath?

A. Yes. That's what they use over there by law.

Q. Is that an expensive device you have shown us?

A. I don't know what they're getting for them. They ought not to get over 50 cents, I would think. Silica gel is very cheap. The State could make them up themselves. You don't have to buy them from anybody. They could make them up.

Q. Now, that particular method that you've just explained with silica gel and the modification of the Intoxilyzer, is that approved by the State of California, Department of Health, at this time for forensic alcohol analysis?

A. No. I don't know — no, it's not approved here yet.

Q. Is it approved in Colorado?

A. Yes, it is.

Q. In your opinion, Mr. Murray, again based upon your knowledge and experience in this field, is the silica gel ampul adaptation to the Intoxilyzer for collection of breath samples for later analysis scientifically reliable?

A. Yes, it is.

Q. And do you believe that if it were proposed to the State of California that it would meet the standards that the State has set forth?

(page 84) A. I don't see why not. It's more reliable than the Intoxilyzer itself is, so I don't see why you'd have any trouble getting this put in so we could recheck those cases that were — was in dispute.

Q. Would that particular collection device, the silica gel, also be tested on a gas chromatograph type instrument?

A. That's another nice feature about it. You can use any — wet chemical techniques or you can test this on gas chromatograph. You can test it on a large reel infrared one does a fingerprint analysis on, not a breath machine but an expensive fingerprint machine. You could test it on gas chromatograph with a mass spectrophotometer. You could pick up traces of solvents for solvent poisoning that — when they have been in a person for up to 300 days later by the use of this technique right here.

. . .

(page 106) Q. In your opinion, if law enforcement had an Intoxilyzer machine and an Indium Crimper device and kit and captured a sample with the Indium Crimper within a few minutes after the testing on the Intoxi-

lyzer, would that Indium Crimper have (page 107) a valid sample for comparing against the Intoxilyzer?

A. Yes.

MR. TANSIL: Objection. Beyond the scope of cross-examination.

THE COURT: No. Overruled.

THE WITNESS: Yes, it would be valid and it's a common—very well accepted technique, which sometimes I have to take as high as four breaths on a device to get a proper breath on that subject just on the regular test without saving a breath.

• • •

(page 109) Q. Mr. Murray, do you need 600 cc's of a breath sample for the Intoximeter Field Crimping device to get a valid breath alcohol test?

A. On the crimping device?

Q. Yes.

A. No, sir, you do not. You only need about a quarter of a cc.

• • •

(Page 116) EUGENE PERSON, called as a witness on behalf of the People, having been previously sworn, testified as follows, to wit:

Direct Examination

BY MR. TANSIL:

Q. What is your current occupation?

A. I'm a criminalist employed by the State Department of Justice, working at the Santa Rosa Laboratory.

Q. How long have you worked at the Department of Justice?

A. I have been with the Department of Justice approximately 11 years, perhaps 12. I have been at the laboratory here since it opened in 1975.

Q. In your work with the Department of Justice, have you been certified as a forensic alcohol analyst?

A. I'm certified as a forensic alcohol supervisor.

. . .

(page 126) Q. Mr. Person, from what you have told me, this—the Intoxilyzer machine does not purge itself without the air pump use, does it?

A. It would over a considerable period of time, but not within the immediate time frame of an analysis.

Q. You haven't done any tests to determine how long it takes for the Intoxilyzer chamber to purge itself without the assistance of the air pump, have you, sir?

A. No, sir. I just know it's more than a ten, fifteen, (page 127) twenty minute period.

Q. Just ten, fifteen?

A. I say it's longer.

Q. But you wouldn't know whether it was an hour, five hours or a day, would you?

A. No, sir, I wouldn't.

. . .

(page 128) Q. All right. So this pump is designed to kick enough clean air through there to clear out all of the contaminated air from any suspect or from a simulator solution; is that right?

A. That's correct, yes.

Q. Because you wouldn't want to take another test if there was some contaminated vapor in there that was other than clear or air blank; is that right?

A. Well, you couldn't get an accurate test.

Q. That's right. Now, Mr. Person, there is no law in the State of California and no regulation in the State of California that would prohibit a police agency from having an (page 129) Intoximeter Field Crimper Indium Tube Encapsulation kit available at the police station to collect a separate sample before or following any test run on the Intoxilyzer; isn't that correct?

A. Well, there's no law that I know of that says that any of the approved instruments could not be kept at one location.

Q. In other words, you might have all three of them there and use all three?

A. There's no law that says you can't as far as I'm aware.

Q. You're aware that the Intoximeter Field Crimper can be utilized separate and apart from the Intoxilyzer machine to collect a breath, are you not?

A. That's the only way it can properly be used.

Q. Now, Mr. Person, if you were to administer as an operator of Intoxilyzer 4011 AW machine to test on a

suspect and you went through all the procedure on the Intoxilyzer to do that and then you collected another sample using the Intoximeter Field Crimper within a few minutes following the test on the Intoxilyzer, you would expect, would you not, that the test collected by the Field Crimper would be a valid sample and would co-relate in qualitative integrity for testing as against the Intoxilyzer test, would you not?

A. Well, since the procedure you speak of, the Indium Tube Encapsulation kit or whatever, since it has been approved by the Department of Health who did run tests on it before approval for breath testing, I would have no reason to suspect that any sample taken according to directions with that particular method would not be valid as much as one (page 130) taken by another method.

Q. That's what I was driving at. And if it was taken within a few minutes following the Intoxilyzer test, you would regard that as a valid sample for checking against the Intoxilyzer, would you not?

A. I would see no reason to have a check.

Q. Well, regardless of whether you would feel that there was a reason to have a check or not have a check, such a sample collected by the Crimper in your opinion would be a valid sample to test against the Intoxilyzer, would it not?

MR. TANSIL: Objection; argumentative.

THE COURT: Overruled.

THE WITNESS: I would expect the two to agree, but I'm not sure who I'd say was checking who.

BY MR. DE MEO:

Q. But you'd expect the two to agree?

A. I would expect it, yes.

* * *

(page 131) Q. Are you also familiar with Title XVII regarding the collection of breath analysis by the various machines that are authorized by the State of California?

A. In general. I'm sure I've read them, but I can't say that I specifically recall any particular point.

MR. DE MEO: I'd like to, if I might, approach Mr. Person.

THE COURT: Sure.

BY MR. DE MEO:

Q. Directing your attention to Article Five which speaks of collection and handling of samples, Section 1219. Are you familiar with that provision that requires that samples taken for forensic alcohol analysis and breath alcohol analysis shall be collected? Are you familiar with that?

A. I'm familiar with the article, yes.

Q. And are you familiar with the specific section on breath analysis which speaks in terms of the collection of the breath sample?

A. Yes, I am familiar with the word being used.

Q. Are you also familiar with the approval issued by the State of California on the Intoxilyzer 4011 model which indicates that immediate analysis of breath samples collected by direct expiration of the subject into the instrument in which the measurement of alcohol concentration is performed? Are you familiar with that?

A. Yes, I'm aware of that.

Q. Can you state whether or not the procedural guide that (page 132) you have told us about that's in the book or wherever concerning the operation of the Intoxilyzer, does it talk about the collection of a sample?

A. Now that you specifically mention it, I'm not certain, but it possibly does.

Q. In fact, it does talk about the collection of a sample, does it not, with the Intoxilyzer machine?

A. As I said, I'm not sure.

MR. TANSIL: Objection; asked and answered.

THE COURT: This is cross-examination.

THE WITNESS: Very probably it does.

BY MR. DE MEO:

Q. "Very probably it does." Is that your answer?

A. Yes, in the same sense that the regulations speak of collections.

• • •

STATE OF CALIFORNIA)
) ss.
COUNTY OF SONOMA)

I, BRENDA B. KRAEGER, a duly certified shorthand reporter of the State of California, do hereby certify:

That the foregoing pages, numbered 1 through 159 inclusive, constitute a full, true and correct transcript of the notes taken by me in the foregoing proceedings in the within-entitled matters.

DATED: May 28, 1981.

/s/ Brenda B. Kraeger

S.C.R. No. C-1896

EXHIBIT A

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(707) 545-3232

Attorneys for Defendant

MUNICIPAL COURT OF CALIFORNIA,
COUNTY OF SONOMA

No. 78402 TCR

PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiffs,

vs.

MELINDA PIERSON BERTRAM,
Defendants.

DECLARATION OF JERRY W. CURRY
(Received March 18, 1981)

I, JERRY W. CURRY, declare as follows:

1. My name is JERRY W. CURRY and my business address is 1041 4th Street, Santa Rosa, California;

2. I have a B.A. degree from San Jose State University in Medical Technology, Chemistry and Microbiology. My year of graduation from San Jose State University was 1961;

3. I am a Forensic Alcohol Supervisor duly qualified as such by the State of California to perform Forensic Alcohol Analysis. I have been so qualified since December 21, 1970.

4. I have been associated with Central Pathology Laboratory, whose present address is 1041 4th Street, Santa Rosa, California, since June 1, 1969

5. I am an officer, stockholder, and a member of the Board of Directors of Central Pathology Laboratory, a California corporation engaged in the since of, among other scientific studies, forensic alcohol analysis from human blood, urine and breath.

6. I am the lab manager of Central Pathology Laboratory.

7. I have personally performed forensic alcohol analysis in conjunction with my association with Central Pathology Laboratory, on human samples of blood, urine, and breath and have personally tested and analyzed well over 1,000 samples of blood, well over 1,000 samples of urine and well over 1,000 samples of breath from different humans for alcohol analysis.

8. From approximately 1970 to some date in 1975, Central Pathology Laboratory performed blood, urine and breath alcohol analysis on behalf of the District Attorney's

office of the County of Sonoma in conjunction with said District Attorney's criminal law enforcement duties, which analyses were primarily involved with individuals suspected of driving motor vehicles while under the influence of alcoholic beverages in violation of the laws of the State of California.

9. From 1972 to a date in 1975, law enforcement agencies in Sonoma County, such as the Sheriff's Office, California Highway Patrol and various City Police groups, used a scientific instrument known as an "Intoximeter Field Crimper-Indium Tube Encapsulation Kit" for the purpose of collecting breath samples in the field, of persons suspected of driving a vehicle under the influence of intoxicating beverages, where those persons requested a breath test. Various police stations throughout Sonoma County also had these instruments on hand at their various stations for collection of breath samples. The above described Intoximeter Field Crimper is designed as a capturing device for entrapment of alcohol in a breath sample for *later analysis*.

It is capable of being used in a stationery location or in a vehicle and the device operates by plugging it into a 110 volts receptacle or a cigarette lighter receptacle in a motor vehicle. The device and accompanying kit is simple to use and requires very little room to house same. No scientific background or knowledge is required to operate the device or capture breath samples.

10. The "Intoximeter Field Crimper-Indium Tube Encapsulation Kit" has been approved for use in California for use in breath alcohol analysis since *August 8, 1973*.

11. The Intoximeter Field Crimper referred to in this declaration and as is approved by the State of California, is designed to collect 3 samples of breath, *each of which may be separately analyzed at a time later than the moment of collection thereof.*

12. Between 1972 and a date in 1975, law enforcement personnel in Sonoma County who had collected breath samples with the Intoximeter Field Crimper would submit three samples of breath from each suspect in Indium Tubes to Central Pathology Laboratory. The laboratory would in turn routinely analyze two of the three samples and retain the third sample intact for retesting by the suspect, should a request for same be made by the suspect.

13. At all times mentioned herein, including the present date, Central Pathology Laboratory owned and utilized a "Gas Chromatograph Intoximeter Mark II". This instrument was approved by the State of California for Breath Alcohol Analysis in 1971 and to this day said instrument continues to be so approved. This instrument allows the *immediate* analysis of breath samples collected by direct expiration by the subject into the instrument in which the measurement of alcohol concentration is performed and it also permits later analysis of breath samples which are collected with an Intoximeter Field Crimper-Indium Tube Encapsulation Kit. Both methods of breath alcohol analysis, i.e. the immediate analysis by direct expiration into the instrument and the *later analysis* from collected samples have been authorized in California for several years.

14. To my personal knowledge, breath alcohol analysis results from collected samples of breath using the aforesaid Intoximeter Field Crimper, have been admissible in

Court as evidence in cases involving persons suspected of driving motor vehicles while under the influence of intoxicating liquor.

15. To my knowledge, the aforesaid Intoximeter Field Crimper-Indium Tube Encapsulation Kits are and have been readily available for purchase and use.

16. The Gas Chromatograph Intoximeter Mark II instrument is available for use in the Central Pathology Laboratory at this time and will continue to be available for use in conducting breath alcohol analysis on a scientifically reliable basis.

17. It is my considered opinion that breath samples which are properly collected with the Intoximeter Field Crimper-Indium Tube Encapsulation Kit may be readily and accurately tested and analyzed for alcohol content. Tests and experiments I have personally performed have indicated that a retained breath sample in an indium tube may be scientifically and reliably tested for up to 3 months after the collection of the breath sample.

18. An approved method of collecting breath samples for later analysis for alcohol content has existed since August of 1973. It is my opinion that law enforcement personnel in Sonoma County have had the capability of capturing and retaining said breath samples for the past several years had they desired to do so. The Intoximeter Field Crimper-Indium Tube Encapsulation Kit may be used separate and apart from any other instrument for the breath collection process and does not depend upon any other instrument for the collection of the breath sample.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on March 16, 1981, at Santa Rosa, California.

/s/ Jerry W. Curry

(Proof of Service Omitted in Printing)

EXHIBIT C

DEMEO & DEMEO

DeMeo Building - 1022 Mendocino Avenue
Santa Rosa, California 95401
(701) 545-3232

Attorneys for Defendant

MUNICIPAL COURT OF CALIFORNIA,
COUNTY OF SONOMA
No. 78532 TCR

PEOPLE OF THE STATE OF CALIFORNIA,
Plaintiffs,
vs.

ALBERT WALTER TROMBETTA,
Defendant.

DECLARATION OF ALBERT WALTER
TROMBETTA IN SUPPORT OF MOTION

(Filed March 3, 1981)

I, ALBERT WALTER TROMBETTA, declare:

1. I am the defendant in the above entitled proceeding;

2. That on or about January 31, 1981 I resided at 4741 Bridle Trail Drive, Santa Rosa, California;

3. On or about January 31, 1981 I was arrested by an Officer of the California Highway Patrol for an alleged violation of California Vehicle Code Section 23102(a);

4. On January 31, 1981, at the Sonoma County Jail, I was administered a breath test on an intoxilyzer machine. No other type of chemical test was administered to me on January 31, 1981 by the California Highway Patrol, or any other law enforcement agency;

5. At no time on January 31, 1981 did any law enforcement officer, or any other person advise me that there would be no sample of my breath preserved.

6. At no time on January 31, 1981, did any law enforcement officer or any other person advise me that no means had been provided by the California Highway Patrol, County of Sonoma, or any other law enforcement agency in this county, for the preservation of a sample of breath;

7. At no time on January 31, 1981, did any law enforcement officer or any other person advise me prior or after the taking of the breath test on the intoxilyzer machine, that there would be no sample of my breath retained for retesting;

8. I would not have submitted to the breath test on the intoxilyzer machine had I been informed that no sample of my breath would be obtained or preserved for retesting;

9. Had I been informed that no sample of my breath would be obtained or preserved for retesting, I would have requested a blood or urine test so that I could have obtained a sample thereof for retesting by an expert of my own choice.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on March 20, 1981, at Santa Rosa, California.

/s/ Albert Walter Trombetta

EXHIBIT D

TITLE 17

FORENSIC ALCOHOL ANALYSIS

Group 8. Forensic Alcohol Analysis and Breath Alcohol Analysis

Article

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2. Requirements for Forensic Alcohol Laboratories
3. Licensing Procedures
4. Training of Personnel
5. Collection and Handling of Samples
6. Methods of Forensic Alcohol Analysis
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Detailed Analysis

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PUBLIC HEALTH

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Article 1. General

1215. Authority. Chapter 5 Sections 436.50-436.63 of Part 1 of Division 1 of the Health and Safety Code.

Note: Authority cited: Sections 102 and 208, Health and Safety Code.

History: 1. New Group 8 (Sections 1215, 1215.1, 1216, 1216.1, 1217, 1217.1 through 1217.8, 1218, 1218.1 and 1218.2) filed 8-10-70; effective thirtieth day thereafter (Register 70, No. 33).

1215.1. Definitions. (a) "Alcohol" means the unique chemical compound, ethyl alcohol, with the exception that reference in these regulations to compounds to be avoided as skin antiseptics includes the generic class of organic compounds known as alcohols.

(b) "Forensic Alcohol Analysis" means the practical application of specialized devices, instruments, and methods by trained laboratory personnel to measure the concentration of ethyl alcohol in samples of blood, breath,

urine, or tissue of persons involved in traffic accidents or traffic violations.

(c) "Breath Alcohol Analysis" means analysis of a sample of a person's expired breath, using a breath testing instrument designed for this purpose, in order to determine the concentration of ethyl alcohol in the person's blood.

(d) "Concentration" means the weight amount of alcohol contained in a unit volume of liquid or a unit volume of gas under specified conditions of temperature and pressure; in the case of a solid tissue specimen, "concentration" means the weight amount of alcohol contained in a unit weight of specimen.

(e) "Forensic Alcohol Laboratory" means a place at which specialized apparatus, instruments, and methods are used by trained laboratory personnel to measure the concentration of alcohol in samples of blood, breath, urine, or tissue of persons involved in traffic accidents or in traffic violations; this may be an activity of a laboratory engaged in activities other than alcohol analysis.

(f) "Forensic Alcohol Supervisor" means a person employed by a forensic alcohol laboratory who can be responsible for all aspects of the performance of forensic alcohol analysis and for the supervision of personnel who perform such analysis.

(g) "Forensic Alcohol Analyst" means a person employed by a forensic alcohol laboratory who performs the technical procedures of forensic alcohol analysis.

(h) "Forensic Alcohol Analyst Trainee" means a person employed by a forensic alcohol laboratory for the purpose of receiving comprehensive practical experience and instruction in the technical procedures of forensic al-

cohol analysis under the supervision of a forensic alcohol supervisor or forensic alcohol analyst.

(i) "Method" means the steps used by a trained person to make a measurement of alcohol concentration.

(j) "Instrument" or "Device" means any item or combination of items of equipment used to make a measurement of alcohol concentration; simple and complex devices are included in this meaning.

(k) "License" means a document issued by the State Department of Health to a laboratory to perform the tests referred to in the Health and Safety Code, Sections 436.51 and 436.52.

(l) "Sample" or "Specimen" means a representative portion of breath, blood, urine, or tissue or of an artificially constituted material, taken for the purpose of measuring its alcohol concentration.

(m) "Alveolar" refers to the smallest air sacs in the lungs and to that portion of the expired breath which is in equilibrium with respect to alcohol with the immediately adjacent pulmonary blood.

(n) "Department" means the California State Department of Health and its duly authorized representatives.

History: 1. Amendment of subsections (b), (c), (d) and (e) filed 10-9-70; effective thirtieth day thereafter (Register 70, No. 41).

2. Amendment filed 11-24-75; effective thirtieth day thereafter (Register 75, No. 48).

Article 2. Requirements for Forensic Alcohol Laboratories

1216. Authorization Requirement. (a) Every laboratory performing forensic alcohol analysis shall have a valid license issued in accordance with the provisions of these regulations.

(1) Forensic alcohol analysis shall be performed only by persons who meet the qualifications set forth in these regulations for forensic alcohol supervisors, forensic alcohol analysts, or forensic alcohol analyst trainees.

(A) A trainee may perform forensic alcohol analysis only under the supervision of a forensic alcohol supervisor or forensic alcohol analyst.

(2) The Department shall not be limited by these regulations in performing functions in administration of the alcohol analysis and licensing program.

History: 1. Amendment filed 11-24-75; effective thirtieth day thereafter (Register 75, No. 48.)

1216.1. Qualifications for Licensing. (a) A laboratory meets the qualifications for licensing by:

(1) Employing at least one forensic alcohol supervisor. If forensic alcohol analysis is performed by persons other than forensic alcohol supervisors, such persons shall meet the qualifications set forth in these regulations for forensic alcohol analysts or forensic alcohol analyst trainees;

(2) Maintaining a quality control program in forensic alcohol analysis procedures;

(3) Demonstrating satisfactory performance in a proficiency testing program conducted by or approved by the Department;

(4) Passing such on-site inspections as the Department may require;

(5) Showing ability to meet the requirements set forth in these regulations.

(b) These qualifications shall be maintained at all times by each licensed laboratory.

(c) The Department may deny a license or renewal thereof, or take disciplinary action against a licensee, for failure to maintain these qualifications in a manner which meets the Department's standards for approval.

(d) Whenever a licensed laboratory employing only one forensic alcohol supervisor loses that person, the Department may upon petition of the laboratory extend the license for a period not exceeding 90 days during which time the laboratory shall hire another forensic alcohol supervisor.

(1) Such an extension shall be contingent on the laboratory's having in its employ at least one forensic alcohol analyst and upon the laboratory's successfully demonstrating to the Department continued competence in forensic alcohol analysis through such proficiency tests, examinations, and on-site inspections as the Department may require.

(e) A forensic alcohol supervisor is a person who meets the following qualifications:

(1) Possesses a baccalaureate or higher degree, or an equivalent, in chemistry, biochemistry, or other appropriate discipline as determined by the Department;

(2) Has two years of experience in performing forensic alcohol analysis, such experience to include experience in interpretation and correlation of alcohol analyses with subjective observations of the demeanor and behavior of persons who have ingested known amounts of ethyl alcohol; or, in lieu of such

two years of experience, satisfactorily completes a training course approved by the Department, such training course to include at minimum the following schedule of subjects:

(A) Value and purpose of forensic alcohol analysis, including breath alcohol analysis;

(B) Physiological action of alcohol;

(C) Pharmacology and toxicology of alcohol;

(D) Laboratory methods of alcohol analysis;

(E) Instruments and procedures for breath alcohol analysis;

(F) Practical laboratory demonstration of the student's ability to perform alcohol analysis;

(G) Interpretation of results of alcohol analysis, including correlation of alcohol analyses with subjective observations of the demeanor and behavior of persons who have ingested known amounts of alcohol;

(H) Court testimony;

(I) Court decisions regarding chemical tests of alcohol to determine alcohol influence; and

(J) Requirements of these regulations;

(3) Successfully demonstrates accuracy in the analysis of proficiency test samples submitted by the Department, and successfully passes examinations prescribed by the Department;

(4) Demonstrates the ability to adhere to the provisions of these regulations; or (in lieu of (1) and (2) above)

(5) Either is a person who, prior to January 1, 1971, qualified as director of a clinical laboratory op-

erating under the provisions of the California Business and Professions Code, or is a person who, for a period of one year prior to January 1, 1971, has been employed in the activities of a forensic alcohol supervisor.

(f) A forensic alcohol analyst is a person who meets the following qualifications:

(1) Successfully completes at least 60 semester-hours, or their equivalent in quarter-hours, of college level courses, including 8 hours of general chemistry and 3 hours of quantitative analysis;

(2) Successfully completes a training period in alcohol analysis on forensic or clinical specimens in a forensic alcohol laboratory or in a clinical laboratory;

(3) Performs during the training period a minimum of 25 analyses of alcohol concentration in blood samples, at least half of which contain alcohol;

(4) Successfully demonstrates accuracy in the analysis of proficiency test samples submitted by the Department, and successfully passes, examinations prescribed by the Department.

(5) Demonstrates ability to adhere to the provisions of these regulations; or (in lieu of (1), (2), and (3) above)

(6) Either is a person who, prior to January 1, 1971, was a clinical laboratory technologist licensed under the provisions of the California Business and Professions Code, or is a person who, for a period of one year prior to January 1, 1971, has been employed in the activities of a forensic alcohol analyst.

(g) A forensic alcohol analyst trainee is a person who meets the following qualifications:

(1) Meets the educational qualification set forth as (1) for a forensic alcohol analyst;

(2) Is employed by a licensed forensic alcohol laboratory.

History: 1. Amendment of subsection (c) (1) filed 10-9-70; effective thirtieth day thereafter (Register 70, No. 41).

2. Amendment of subsection (b) (2) filed 8-2-72; effective thirtieth day thereafter (Register 72, No. 32).

3. Amendment filed 11-24-75; effective thirtieth day thereafter (Register 75, No. 48).

4. Editorial correction (Register 76, No. 24).

Article 3. Licensing Procedures

1217. Forensic Alcohol Laboratory License. (a) Upon receipt of a completed application which shows ability to meet the requirements set forth in these regulations, and upon payment of any required fee, the Department shall submit such proficiency test samples and perform such examinations as are required for that laboratory to complete the qualifications.

(b) Upon the laboratory's successfully completing all the qualifications, the Department shall issue to the applicant laboratory a forensic alcohol laboratory license.

History: 1. Amendment filed 11-24-75; effective thirtieth day thereafter (Register 75, No. 48.)

1217.1. Renewal of Licenses. (a) Licenses under these regulations shall be renewed as required by the Department as long as the activity requiring authorization continues. Renewal shall be contingent upon the laboratory continuing in the qualifications set forth in these regulations.

(1) A forensic alcohol laboratory license shall be valid from January 1 to December 31 of a calendar year. Applications for renewal and applicable fees

shall be submitted to the Department on or before October 1 of each year.

(2) Failure to apply for renewal shall result in forfeiture after a period of three months from the day on which the application for renewal should have been submitted, with the exception that the Department may grant a temporary extension under special circumstances.

(3) An application for renewal shall not list as a forensic alcohol analyst trainee any person who fails to comply with the requirements of Section 1216.1 (f) (4) within a period of one year after he was first listed with the Department as a trainee. The Department may extend this period for a justifiable reason, such as illness.

History: 1. New subsection (c) filed 4-7-71; effective thirtieth day thereafter (Register 71, No. 15).
2. Amendment filed 11-24-75; effective thirtieth day thereafter (Register 75, No. 48).

1217.2. Application Forms. Application for a license and renewal thereof, shall be made on forms furnished by the Department. The applicant shall set forth all pertinent information called for by the form.

1217.3. Report of Change or Discontinuance. (a) A person responsible for the operation of a forensic alcohol laboratory shall report to the Department in writing within 30 days any change in qualified personnel who may be performing forensic alcohol analysis, change of ownership, change of address or change or discontinuance of an activity authorized under these regulations.

(b) Such reports shall be made on forms furnished by the Department and shall set forth all pertinent information called for by the form.

(c) Persons who formerly qualified as forensic alcohol supervisors or forensic alcohol analysts in another laboratory may be required to demonstrate again their ability to meet the requirement of Section 1216.1 (e) (3) or 1216.1 (f) (4) using the method, apparatus and facilities of the forensic alcohol laboratory which newly lists them in such a Report of Change or Discontinuance.

History: 1. Amendments filed 10-9-70; effective thirtieth day thereafter (Register 70, No. 41).

2. Amendment filed 11-24-75; effective thirtieth day thereafter (Register 75, No. 48).

3. Editorial correction (Register 76, No. 24).

1217.4. License Implications. Licenses issued under these regulations shall not imply approval of anything carried out by a laboratory other than what is specified on the document.

1217.5. Licensing Records. Forensic Alcohol Laboratory Licenses shall become part of permanent records available to the courts for legal proceedings or to the Department.

1217.6. Inspection and Additional Requirements. (a) Display of Licenses. Licenses issued under these regulations shall be displayed on request to representatives of the Department.

(b) Access to Premises. The Department may enter at all reasonable times upon any laboratory for the purpose of determining whether or not there is compliance with the provisions of these regulations.

1217.7. Surveys and Proficiency Tests. (a) Laboratories having been licensed or applying for licensing as

forensic alcohol laboratories shall be subject to on-site surveys by representatives of the Department, the results of which must meet the requirements of these regulations, and shall accept periodic evaluation samples, perform analyses and report the results of such analyses to the Department.

(b) These analytical results shall be used by the Department to evaluate the accuracy of the forensic alcohol analyses performed by the laboratory, and the results must meet the requirements of these regulations.

History: 1. Amendment filed 11-24-75; effective thirtieth day thereafter (Register 75, No. 48).

1217.8. Fees and Other Procedures. The annual application fee for a Forensic Alcohol Laboratory License or its renewal shall be one hundred dollars (\$100). A laboratory operated by the state, city or county or other public organization shall be exempt from the annual application fee requirement. Other procedures in the administration of these regulations shall be carried out as set forth in Chapter 5 (commencing with section 436.50) of Part 1 of Division 1 of the Health and Safety Code. Such other procedures include suspension or revocation of license, denial of license, and disciplinary action.

Article 4. Training of Personnel

1218. Training Program Approval. Any organization, laboratory, institution, school, or college conducting a course of instruction for persons to qualify under these regulations shall submit a course summary and list of instructors and their qualifications to the Department for approval.

1218.1. **Additional Requirements.** At the discretion of the Department, any phase or portion of a training program shall be subject to alteration in an effort to update the program as technological advances are made or if a portion has been judged inappropriate.

1218.2. **Contracts.** The Department may contract with persons it deems qualified to administer such practical tests and written or oral examinations as may be required under these regulations. This section shall not be construed to authorize the delegation of any discretionary functions conferred on the Department by law, including, but not limited to, the evaluation of tests and examinations.

Article 5. Collection and Handling of Samples

1219. **General.** Samples taken for forensic alcohol analysis and breath alcohol analysis shall be collected and handled in a manner approved by the Department. The identity and integrity of the samples shall be maintained through collection to analysis and reporting.

NOTE: Authority cited: Sections 102 and 208, Health and Safety Code. Reference: Section 436.50, Health and Safety Code.

History: 1. New Article 5 (§§1219, 1219.1, 1219.2, 1219.3), filed 10-9-70, effective thirtieth day thereafter (Register 70, No. 41).

2. Amendment filed 11-24-75; effective thirtieth day thereafter (Register 75, No. 48).

1219.1. **Blood Collection and Retention.** (a) Blood samples shall be collected by venipuncture from living individuals as soon as feasible after an alleged offense and

only by persons authorized by Section 133354 of the Vehicle Code.

(b) Sufficient blood shall be collected to permit duplicate determinations.

(c) Alcohol or other volatile organic disinfectant shall not be used to clean the skin where a specimen is to be collected. Aqueous benzalkonium chloride (zephiran), aqueous merthiolate or other suitable aqueous disinfectant shall be used.

(d) Blood samples shall be collected using sterile, dry hypodermic needles and syringes, or using clean, dry vacuum type containers with sterile needles. Reusable equipment, if used, shall not be cleaned or kept in alcohol or other volatile organic solvent.

(e) The blood sample shall be deposited into a clean, dry container which is closed with an inert stopper.

(1) Alcohol or other volatile organic solvent shall not be used to clean the container.

(2) The blood shall be mixed with an anticoagulant and a preservative.

(f) When blood samples for forensic alcohol analysis are collected post-mortem, all practical precautions to insure an uncontaminated sample shall be employed, such as:

(1) Samples shall be obtained prior to the start of any embalming procedure. Blood samples shall not be collected from the circulatory system effluent during arterial injection of embalming fluid. Coroner's samples do not need a preservative added if stored under refrigeration.

(2) Care shall be taken to avoid contamination by alcohol from the gastrointestinal tract directly or

by diffusion therefrom. The sample shall be taken from a major vein or the heart.

(g) In order to allow for analysis by the defendant, the remaining portion of the sample shall be retained for one year after the date of collection.

(1) In coroner's cases, blood samples shall be retained for at least 90 days after date of collection.

(2) Whenever a sample is requested by the defendant for analysis and a sufficient sample remains, the forensic alcohol laboratory or law enforcement agency in possession of the original sample shall continue such possession, but shall provide the defendant with a portion of the remaining sample in a clean container together with a copy or transcript of the identifying information carried on the original sample container.

History: 1. Amendment of subsection (d) filed 4-7-71; effective thirtieth day thereafter (Register 71, No. 15).

2. Amendment filed 11-24-75; effective thirtieth day thereafter (Register 75, No. 48).

1219.2. Urine Collection and Retention. (a) The only approved urine sample shall be a sample collected no sooner than twenty minutes after first voiding the bladder.

(b) The specimen shall be deposited in a clean, dry container which also contains a preservative.

(c) In order to allow for analysis by the defendant, the remaining portion of the sample shall be retained for one year after the date of collection.

(1) Whenever a sample is requested by the defendant for analysis and a sufficient sample remains, the forensic alcohol laboratory or law enforcement

agency in possession of the original sample shall continue such possession, but shall provide the defendant with a portion of the remaining sample in a clean container together with a copy or transcript of the identifying information carried by the original sample container.

History: 1. Amendment of subsection (a) filed 4-7-71; effective thirtieth day thereafter (Register 71, No. 15).

2. Amendment filed 11-24-75; effective thirtieth day thereafter (Register 75, No. 48).

1219.3. Breath Collection. A breath sample shall be expired breath which is essentially alveolar in composition. The quantity of the breath sample shall be established by direct volumetric measurement. The breath sample shall be collected only after the subject has been under continuous observation for at least fifteen minutes prior to collection of the breath sample, during which time the subject must not have ingested alcoholic beverages or other fluids, regurgitated, vomited, eaten, or smoked.

History: 1. Amendment filed 4-7-71; effective thirtieth day thereafter (Register 71, No. 15).

Article 6. Methods of Forensic Alcohol Analysis

1220. General. (a) All laboratory methods used for forensic alcohol analysis shall be subject to standards set forth in this Article.

(b) Each licensed forensic alcohol laboratory shall have on file with the Department detailed, up-to-date written descriptions of each method it uses for forensic alcohol analysis.

(1) Such descriptions shall be immediately available to the person performing an analysis and shall be available for inspection by the Department on request.

(2) Each such description shall include the calibration procedures and the quality control program for the method.

NOTE: Authority cited: Sections 102 and 208, Health and Safety Code. Reference Section 436.50, Health and Safety Code.

History: 1. New Article 6 (§§ 1220.1 through 1220.4) filed 10-9-70; effective thirtieth day thereafter (Register 70, No. 41).

2. Amendment filed 11-24-75; effective thirtieth day thereafter (Register 75, No. 48).

1220.1. Standards of Performance. (a) Methods for forensic alcohol analysis shall meet the following standards of performance:

(1) The method shall be capable of the analysis of a reference sample of known alcohol concentration within accuracy and precision limits of plus or minus 5 percent of the value; these limits shall be applied to alcohol concentrations which are 0.10 grams per 100 milliliters or higher;

(2) The method shall be capable of the analysis of ethyl alcohol with a specificity which is adequate and appropriate for traffic law enforcement.

(3) The method should be free from interference from anticoagulants and preservatives added to the sample;

(4) Blood alcohol results on post-mortem samples shall not be reported unless the oxidizable substance is identified as ethyl alcohol by qualitative test;

(5) The method shall give a test result which is always less than 0.01 grams of alcohol per 100 milliliters of blood when living subjects free of alcohol are tested.

(b) The ability of methods to meet the standards of performance set forth in this Section shall be evaluated

by the Department using a laboratory's proficiency test results and such ability must meet the requirements of these regulations.

History: 1. Amendment filed 11-24-75; effective thirtieth day thereafter (Register 75, No. 48).

1220.2. Standards of Procedure. (a) Methods for forensic alcohol analysis shall meet the following standards of procedure:

(1) The method shall be calibrated with standards which are water solutions of alcohol.

(A) Such alcohol solutions are secondary standards.

(B) Each forensic alcohol laboratory shall establish the concentration of each lot of secondary alcohol standards it uses, whether prepared or acquired, by an oxidimetric method which employs a primary standard, such as United States National Bureau of Standards potassium dichromate;

(2) The procedure shall include blank and secondary alcohol standard samples at least once each day that samples are subjected to forensic alcohol analysis.

(A) The blank and secondary alcohol standard samples shall be taken through all stops of the method used for forensic alcohol analysis of samples.

(3) The procedure shall also include analysis of quality control, reference samples as described in Section 1220.3 and shall include at least duplicate analyses of samples for forensic alcohol analysis.

(A) A quality control reference sample shall not be taken from the same lot of alcohol solution which is used as a secondary alcohol standard.

(4) Alcohols or other volatile organic solvents shall not be used to wash or rinse glassware and instruments used for alcohol analysis;

(5) All instruments used for alcohol analysis shall be in good working order and routinely checked for accuracy and precision.

History: 1. Amendment filed 11-24-75; effective thirtieth day thereafter (Register 75, No. 48).

1220.3. Quality Control Program. (a) Methods for forensic alcohol analysis shall be performed in accordance with the following quality control program:

(1) For each method of forensic alcohol analysis it performs, each forensic alcohol laboratory shall make or acquire a suitable quality control reference material containing alcohol, a sample of which it shall analyze along with each set of samples; the alcohol concentration in the reference material shall be between 0.10 and 0.20 grains per 100 milliliters of liquid.

(2) For each lot of quality control reference material, the laboratory shall determine a mean value of at least 20 replicate analyses, at a rate of no more than 2 analyses per day, with the method used for analysis of samples for forensic alcohol analysis;

(3) Acceptable limits of variation for the method shall be set as follows:

(A) The lower limit shall be calculated by subtracting, from the mean value, 0.01 grams per 100 milliliters;

(B) The higher limit shall be calculated by adding, to the mean value, 0.01 grains per 100 milliliters;

(4) At least one sample of the quality control reference material shall be analyzed with each set of samples analyzed for the purpose of forensic alcohol analysis;

(5) Whenever analysis of the quality control reference material is outside the acceptable limits, the method shall be regarded to be in error and a forensic alcohol supervisor shall take remedial action to investigate and correct the source of error;

(6) Until such time as the error has been corrected, as shown by return of the analysis of the quality control reference material to values within the acceptable limits, no samples shall be analyzed for the purpose of forensic alcohol analysis.

History: 1. Amendment filed 11-24-75; effective thirtieth day thereafter (Register 75, No. 48).

1220.4. Expression of Analytical Results. (a) With the exception of tissue analysis, all analytical results shall be expressed in terms of the alcohol concentration in blood, based on the number of grams of alcohol per 100 milliliters of blood.

(1) The symbols, grams %, %, and % (W/V), shall be regarded as acceptable abbreviations of the phrase, grams per 100 milliliters of liquid.

(b) Analytical results shall be reported to the second decimal place, deleting the digit in the third decimal place when it is present.

(c) Blood alcohol concentrations less than 0.01% in living subjects may be reported as negative.

(d) Blood alcohol concentrations less than 0.02% on post-mortem blood samples may be reported as negative.

(e) A urine alcohol concentration shall be converted to an equivalent blood alcohol concentration by a calculation based on the relationship: the amount of alcohol in 1.3 milliliters of blood is equivalent to the amount of alcohol in 1 milliliter of urine.

(f) A breath alcohol concentration shall be converted to an equivalent blood alcohol concentration by a calculation based on the relationship: the amount of alcohol in 2,100 milliliters of alveolar breath is equivalent to the amount of alcohol in 1 milliliter of blood.

(g) Tissue analysis results shall be expressed in terms of a weight amount of alcohol in a unit weight of the specimen.

History: 1. Amendment filed 11-24-75; effective thirtieth day thereafter (Register 75, No. 48).

2. Editorial correction (Register 76, No. 24).

Article 7. Requirements for Breath Alcohol Analysis

1221. General. Breath alcohol analysis shall be performed in accordance with standards set forth in this Article.

NOTE: Authority cited: Sections 102 and 208, Health and Safety Code. Reference: Section 436.50, Health and Safety Code.

History: 1. New Article 7 (Sections 1221, 1221.1 through 1221.5) filed 10-9-70; effective thirtieth day thereafter (Register 70, No. 41).

2. Amendment filed 11-24-75; effective thirtieth day thereafter (Register 75, No. 48).

1221.1. Authorized Procedures. (a) Breath alcohol analysis shall be performed only with instruments and related accessories which meet the standards of performance set forth in these regulations.

(b) Such instruments may be used for the analysis of breath samples in places other than licensed forensic alcohol laboratories and by persons other than forensic alcohol supervisors, forensic alcohol analysts and forensic

alcohol analyst trainees only if such places and persons are under the direct jurisdiction of a governmental agency or licensed forensic alcohol laboratory.

(1) Breath alcohol analysis by persons other than forensic alcohol supervisors, forensic alcohol analysts and forensic alcohol analyst trainees shall be restricted to the immediate analysis of breath samples collected by direct expiration by the subject into the instrument in which the measurement of alcohol concentration is performed.

(2) Except for the requirements of Section 1220.4, such immediate analysis shall not be subject to the requirements of Article 6.

(c) Breath alcohol analysis may be performed on samples which are collected with a sample capturing instrument designed for entrapment of a breath sample or for entrapment of the alcohol in a breath sample for later analysis.

(1) Whereas persons other than forensic alcohol supervisors, forensic alcohol analysts or forensic alcohol analyst trainees may perform sample capture, the actual later analysis of alcohol in captured samples to determine persons' blood alcohol concentrations shall be performed only by a licensed forensic alcohol laboratory using a method which meets the standards set forth in Article 6 of these regulations.

(2) The combined procedures of sample capture and later analysis shall have the ability to meet the standards of performance set forth in Section 1221.2.

History: 1. Amendment filed 11-24-75; effective thirtieth day thereafter (Register 75, No. 48).

1221.2. Standards of Performance. (a) Instruments for breath alcohol analysis shall meet the following standards of performance:

(1) The instrument and any related accessories shall be capable of the collection and analysis of breath

specimens which are essentially alveolar in composition;

(2) The instrument shall be capable of analyzing a blank sample and of analyzing a suitable reference sample, such as air equilibrated with a reference solution of known alcohol content at a known temperature;

(3) The instrument shall be capable of the analysis of a reference sample of known alcohol concentration within accuracy and precision limits of plus or minus 0.01 grams % of the true value; these limits shall be applied to alcohol concentrations from 0.10 grams % to 0.30 grams %;

(4) The instrument shall be capable, in a controlled experiment, of breath alcohol analysis which results in a determination of a subject's blood alcohol concentration which has correlation with his actual blood alcohol concentration as measured on a blood sample taken at approximately the same time as the breath sample;

(5) The instrument shall be capable of breath alcohol analysis which results in a concentration less than 0.01 grams of alcohol per 100 milliliters of blood when alcohol-free subjects are tested.

(b) For sample capturing instruments there shall be the following additional standard:

(1) The alcohol concentration of captured samples shall be sufficiently stable that the requirements set forth in (a) (3) and (a) (4) above can be met when 14 days elapse between sample capture and later analysis.

(c) The ability of instruments and any related accessories to meet the standards of performance set forth in this Section shall be subject to evaluation by the Department.

History: 1. Repealer of subsection (b) and relettering of (c), (d), (e), (f) and (g) to (b), (c), (d),

(e) and (f) filed 4-7-71; effective thirtieth day thereafter (Register 71, No. 15).

2. Amendment filed 11-24-75; effective thirtieth day thereafter (Register 75, No. 48).

1221.3. Instrument Evaluations. (a) On or after January 1, 1971, all organizations selling or offering for sale instruments for breath alcohol analysis in this State shall register such instruments and related accessories with the Department.

(b) Such registration shall be made on forms furnished by the Department and shall set forth all pertinent information called for by the form in a manner which meets the Department's standards for approval.

(c) On or after January 1, 1972, only such types and models of instruments and related accessories as have been approved by the Department shall be used for breath alcohol analysis in this State.

(d) Approval or disapproval shall be based on laboratory evaluation by the Department of the abilities of representative items of such instruments and related accessories to meet the standards of performance set forth in Section 1221.2.

- (1) It shall be the responsibility of an instrument's manufacturer, or the person requesting the evaluation, to make arrangements with the Department to have an instrument evaluated.

- (2) The manufacturer, or the person requesting the evaluation, shall provide the Department with the instruments, related accessories, chemical reagents, full directions and any other materials needed for the evaluation, and shall provide the Department with such technical consultation as is necessary during the evaluation.

(c) The Department shall report the results of the evaluation to the manufacturer or the person requesting the evaluation, and shall have rights of promulgation of the results.

(f) The Department shall not accept for evaluation any instrument or procedure for which analysis is made esoteric by reason of secrecy, commercial unavailability or incomplete directions.

(g) The Department shall not accept for evaluation any instrument or accessory for which the information, data and documents submitted with the registration fail to support a judgment by the Department that the instrument or accessory is in ostensible compliance with the requirements of these regulations when operated according to the manufacturer's directions.

(h) On or after January 1, 1972, the Department shall provide on request a list of instruments and related accessories approved for breath alcohol analysis.

(i) Approval by the Department of a particular type and model of instrument or accessory shall signify its approval of all such instruments and accessories which are of the same type and model as those instruments and accessories actually subjected to laboratory evaluation by the Department.

(1) The Department may also approve modified versions of such approved instruments and accessories when, in the judgment of the Department, the modifications do not alter the abilities of such instruments and accessories to meet the standards of performance set forth in Section 1221.2 inasmuch as the modified versions are equivalent in performance to the approved versions.

(2) The Department may also approve related accessories other than those manufactured by the manufacturer of the approved accessories when, in the judgment of the Department, such accessories are equivalent to the approved accessories.

(3) In cases of requests for approvals on the basis of equivalence, the manufacturer, or the person requesting the approval, shall provide the Department with such information, data and documents as the Department requires to reach a judgment.

(4) The manufacturer, or the person requesting the approval, shall additionally provide the Department with such instruments, related accessories, chemical reagents, full directions and any other materials needed for the Department to reach a judgment, and shall provide the Department with such technical consultation as is needed.

History: 1. Amendment filed 11-24-75; effective thirtieth day thereafter (Register 75, No. 48).

2. Editorial correction (Register 76, No. 24).

1221.4. Standards of Procedure. (a) Procedures for breath alcohol analysis shall meet the following standards:

(1) For each person tested, breath alcohol analysis shall include analysis of 2 separate breath samples which result in determinations of blood alcohol concentrations which do not differ from each other by more than 0.02 grams per 100 milliliters.

(2) The accuracy of instruments shall be determined.

(A) For an instrument designed for immediate analysis of breath samples collected by direct expiration by the subject into the instrument, such determination of accuracy shall consist, at a minimum, of periodic analysis of a reference sam-

ple as described in Section 1221.2(a) (3) and which is provided by a forensic alcohol laboratory.

1. Such analysis shall be performed by an operator as defined in Section 1221.4 (a) (5), and the results shall be used by a forensic alcohol laboratory to determine if the instrument continues to meet the standard of accuracy set forth in Section 1221.2 (a) (3).

(B) For disposable components of an instrument designed for capture of samples for later analysis, such determination of accuracy shall consist of analysis of a reference sample, performed by a forensic alcohol laboratory, using representative disposable components randomly selected from each manufacturer's lot used, and the results shall be used by a forensic alcohol laboratory to determine if the instrument meets the standard of accuracy set forth in Section 1221.2 (a) (3).

1. For a nondisposable component, if any, which is used repetitively for sample capture in disposable components, such determination of accuracy shall consist, at a minimum, of periodic analysis of a reference sample as described in Section 1221.2 (a) (3) and which is provided by a forensic alcohol laboratory.

2. Whereas capture of such a sample shall be performed by an operator as defined in Section 1221.4 (a) (5), the captured sample shall be analyzed by a forensic alcohol laboratory, and the results shall be used by a forensic alcohol laboratory to determine if the instrument continues to meet the standard of accuracy set forth in Section 1221.2 (a) (3).

(C) For the purposes of such determinations of accuracy, "periodic" means either a pe-

riod of time not exceeding 10 days or following the testing of every 150 subjects, whichever comes sooner.

(3) Breath alcohol analysis shall be performed only with instruments for which the operators have received training, such training to include at minimum the following schedule of subjects:

- (A) Theory of operation;
- (B) Detailed procedure of operation;
- (C) Practical experience;
- (D) Precautionary checklist;
- (E) Written and/or practical examination.

(F) For sample capturing instruments, training may exclude the later analysis which is performed in a forensic alcohol laboratory.

(G) Persons who have been engaged in the use of an instrument for the six months prior to January 1, 1971, shall be considered to have been trained and examined in the procedures for that instrument.

(4) Training in the procedures of breath alcohol analysis shall be under the supervision of persons who qualify as forensic alcohol supervisors, forensic alcohol analysts or forensic alcohol analyst trainees in a licensed forensic alcohol laboratory.

(A) After approval as set forth in Section 1218, the forensic alcohol laboratory is responsible for the training and qualifying of its instructors.

(5) An operator shall be a forensic alcohol supervisor, forensic alcohol analyst, forensic alcohol analyst trainee or a person who has completed successfully the training described under Section 1221.4 (a) (3) and who may be called upon to operate a breath testing instrument in the performance of his duties.

(6) Records shall be kept for each instrument to show the frequency of determination of accuracy and the identity of the person performing the determination of accuracy.

(A) Records shall be kept for each instrument at a licensed forensic alcohol laboratory showing compliance with this Section.

History: 1. Amendment filed 11-24-75; effective thirtieth day thereafter (Register 75, No. 48).

1221.5. Expression of Analytical Results. Results of breath alcohol analysis shall be expressed as set forth in Section 1220.4.

Article 8. Records

1222. General. Forensic alcohol laboratories and law enforcement agencies shall maintain records which clearly represent their activities which are covered by these regulations. Such records shall be available for inspection by the Department on request.

NOTE: Authority cited: Sections 102 and 208, Health and Safety Code. Reference: Section 436.50, Health and Safety Code.

History: 1. New Article 8 (§§ 1222, 1222.1, 1222.2) filed 10-9-70; effective thirtieth day thereafter (Register 70, No. 41).

1222.1. Forensic Alcohol Laboratory Records. (a) Each laboratory which is licensed to perform forensic alcohol analysis shall keep the following records for a period of at least three years:

(1) An up-to-date record of persons in its employ who are qualified as forensic alcohol supervisors and forensic alcohol analysts; the record shall include the qualifications of each such person, including edu-

cation, experience, training and performance in proficiency tests and examinations;

(2) A list of persons in its employ who are forensic alcohol analyst trainees, the date on which each such person began his training period and the number and results of analyses performed during the training period;

(3) Records of samples analyzed by that laboratory under these regulations, their results and the identity of persons performing the analyses;

(4) Records of the quality control program;

(5) Records of laboratory performance evaluation in alcohol analysis as shown by results of proficiency tests;

(6) Records of such determinations of accuracy of breath testing instruments as a laboratory may perform for law enforcement agencies;

(7) Records of such training as a laboratory may provide to persons to operate breath testing instruments for law enforcement agencies.

History: 1. Amendment filed 11-24-75; effective thirtieth day thereafter (Register 75, No. 48).

1222.2. Breath Alcohol Analysis Records. (a) Each agency shall keep the following records for breath testing instruments which are under its jurisdiction:

(1) Records of instrument determinations of accuracy;

(2) Records of analyses performed, results and identities of the persons performing analyses;

(3) At the location of each instrument, the precautionary checklist to be used by operators of the instrument.

History: 1. Amendment filed 11-24-75; effective thirtieth day thereafter (Register 75, No. 48).

2. Editorial correction (Register 76, No. 24).

EXHIBIT E

LIST OF INSTRUMENTS AND RELATED
ACCESSORIES APPROVED FOR BREATH
ALCOHOL ANALYSIS

Date of Preparation of this List: December 20, 1979

Section 1221.3(c) of the Regulations Relating to Forensic Alcohol Analysis and Breath Alcohol Analysis, contained in Title 17 of the California Administrative Code, states that only such instruments as have been approved by the California State Department of Health Services shall be used for breath alcohol analysis in this State; approval shall be based on laboratory evaluation by the Department of such instruments' abilities to meet the standards of performance set forth in Section 1221.2 of the regulations.

The following is the list of instruments and related accessories which are so approved. This list supersedes and replaces the list published on June 6, 1978. Instruments are named in alphabetical order. Source or sources of accessories are shown in parentheses.

Approved Instrument and Model Number:

Alco-Analyzer Gas Chromatograph
(No Model Number Designated)

Manufacturer:

Luckey Laboratories, Inc.
7252 Osbun Road
San Bernardino, CA 92404

Related Accessories Approved for this Instrument:

Luckey Simulator, set to maintain a solution temperature of $34^{\circ}\text{C} \pm 0.2^{\circ}\text{C}$.
(Luckey Laboratories, Inc.)

**Luckey 5-inch Gas Chromatograph Chart Recorder
and Sola Transformer.**

(Luckey Laboratories, Inc.)

Authorized Breath Alcohol Analysis with this Instrument:

Immediate analysis of breath samples collected by direct expiration by the subject into the instrument in which the measurement of alcohol concentration is performed.

Approved Instrument and Model Number:

Alco-Analyzer Gas Chromatograph Model 1000

Manufacturer:

Luckey Laboratories, Inc.
7252 Osburn Road
San Bernardino, CA 92404

Related Accessories Approved for this Instrument:

Luckey Simulator, set to maintain a solution temperature of $34^{\circ}\text{C} \pm 0.2^{\circ}\text{C}$.

Authorized Breath Alcohol Analysis with this Instrument:

Immediate analysis of breath samples collected by direct expiration by the subject into the instrument in which the measurement of alcohol concentration is performed.

Subject must take a deep breath and blow one continuous breath sample of 10 seconds or more and must continue to blow until the whistle stops.

Approved Instrument and Model Number:

 *Breathalyzer Model 900**

Manufacturer:

Smith and Wesson Electronics Company
2100 Roosevelt Avenue
Springfield, Massachusetts 01101

Related Accessories Approved for this Instrument:

*Formerly manufactured by Stephenson Corporation.

Equilibrator*. (Smith and Wesson Electronics Company)

Mark II Breath Alcohol Simulator*, set to maintain a solution temperature of $34^{\circ}\text{C} +/\!- 0.2^{\circ}\text{C}$. (Smith and Wesson Electronics Company)

Mark IIA Breath Alcohol Simulator, set to maintain a solution temperature of $34^{\circ}\text{C} +/\!- 0.2^{\circ}\text{C}$. (Smith and Wesson Electronics Company)

Breathalyzer Solution Ampoules, Mouthpieces, and Bubblers; Breathalyzer Model 900 Test Records; Output Gauge* and Ampoule Gauge*. (Smith and Wesson Electronics Company)

Authorized Breath Alcohol Analysis with this Instrument:

Immediate analysis of breath samples collected by direct expiration by the subject into the instrument in which the measurement of alcohol concentration is performed.

Approved Instrument and Model Number:

Breathalyzer Model 900A

Manufacturer:

Smith and Wesson Electronics Company
2100 Roosevelt Avenue
Springfield, Massachusetts 01101

Related Accessories Approved for this Instrument:

Mark II Breath Alcohol Simulator*, set to maintain a solution temperature of $34^{\circ}\text{C} +/\!- 0.2^{\circ}\text{C}$. (Smith and Wesson Electronics Company)

Mark IIA Breath Alcohol Simulator, set to maintain a solution temperature of $34^{\circ}\text{C} +/\!- 0.2^{\circ}\text{C}$. (Smith and Wesson Electronics Company)

Breathalyzer Solution Ampoules, Mouthpieces, and Bubblers; Breathalyzer Model 900A Test Records;

*Formerly manufactured by Stephenson Corporation.

Output Gauge* and Ampoule Gauge*. (Smith and Wesson Electronics Company)

Authorized Breath Alcohol Analysis with this Instrument:

Immediate analysis of breath samples collected by direct expiration by the subject into the instrument in which the measurement of alcohol concentration is performed.

Approved Instrument and Model Number:

Breathalyzer Model 1000

Manufacturer:

Smith and Wesson Electronics Company
2100 Roosevelt Avenue
Springfield, Massachusetts 01101

Related Accessories Approved for this Instrument:

Mark II Breath Alcohol Simulator*, set to maintain a solution temperature of $34^{\circ}\text{C} \pm 0.2^{\circ}\text{C}$. (Smith and Wesson Electronics Company)

Mark IIA Breath Alcohol Simulator, set to maintain a solution temperature of $34^{\circ}\text{C} \pm 0.2^{\circ}\text{C}$. (Smith and Wesson Electronics Company)

Breathalyzer Solution Ampoules, Mouthpieces, and Bubbler; Breathalyzer Model 1000 Test Record; Output Gauge and Ampoule Gauge. (Smith and Wesson Electronics Company)

Authorized Breath Alcohol Analysis with this Instrument:

Immediate analysis of breath samples collected by direct expiration by the subject into the instrument in which the measurement of alcohol concentration is performed.

*Formerly manufactured by Stephenson Corporation.

Approved Instrument and Model Number:

Gas Chromatograph Intoximeter Mark II

Manufacturer:

CalDetect, Inc.
101 West Nevin Avenue
Richmond, CA 94801

Related Accessories Approved for this Instrument:

Mark II Breath Alcohol Simulator*, set to maintain a solution temperature of $34^{\circ}\text{C} +/ - 0.2^{\circ}\text{C}$. (Smith and Wesson Electronics Company)

Mark IIA Breath Alcohol Simulator, set to maintain a solution temperature of $34^{\circ}\text{C} +/ - 0.2^{\circ}\text{C}$. (Smith and Wesson Electronics Company)

Digital Concentration Readout Accessory. (CalDetect, Inc.)

External Chart Recorder, MPI Model MP-1027. (CalDetect, Inc.)

Mouthpieces; Intoximeter Waste Bag Assembly with Check Valve and Restrictor; Plug-in Calibrator. (CalDetect, Inc.)

Authorized Breath Alcohol Analysis with this Instrument:

Immediate analysis of breath sample collected by direct expiration by the subject into the instrument in which the measurement of alcohol concentration is performed.

Also, analysis of breath samples which are collected with an Intoximeter Field Crimper-Indium Tube Encapsulation Kit, a breath alcohol capturing device designed for entrapment of the alcohol in a breath sample for later analysis using a Gas Chromatograph Intoximeter Mark II.

*Formerly manufactured by Stephenson Corporation.

Approved Instrument and Model Number:

Gas Chromatograph Intoximeter Mark IV

Manufacturer:

CalDetect, Inc.
101 West Nevin Avenue
Richmond, CA 94801

Related Accessories Approved for this Instrument:

Mark II Breath Alcohol Simulator*, set to maintain a solution temperature of $34^{\circ}\text{C} +/ - 0.2^{\circ}\text{C}$. (Smith and Wesson Electronics Company)

Mark IIA Breath Alcohol Simulator, set to maintain a solution temperature of $34^{\circ}\text{C} +/ - 0.2^{\circ}\text{C}$. (Smith and Wesson Electronics Company)

Mouthpieces. (CalDetect, Inc.)

Authorized Breath Alcohol Analysis with this Instrument:

Immediate analysis of breath sample collected by direct expiration by the subject into the instrument in which the measurement of alcohol concentration is performed.

Also, analysis of breath samples which are collected with an Intoximeter Field Crimper-Indium Tube Encapsulation Kit, a breath alcohol capturing device designed for entrapment of the alcohol in a breath sample for later analysis using a Gas Chromatograph Intoximeter Mark IV.

*Formerly manufactured by Stephenson Corporation.

Approved Instrument and Model Number

*Intoxilyzer Model 4011**

Manufacturer:

CMI, Incorporated
P.O. Drawer D, Old Hwy 6
Minturn, Colorado 81645

Related Accessories Approved for this Instrument:

Mark II Breath Alcohol Simulator**, set to maintain a solution temperature of $34^{\circ}\text{C} \pm 0.2^{\circ}\text{C}$, and modified to have outlet tube tightly secured to the Simulator outlet. (Smith and Wesson Electronics Company)

Mark IIA Breath Alcohol Simulator, set to maintain a solution temperature of $34^{\circ}\text{C} \pm 0.2^{\circ}\text{C}$. (Smith and Wesson Electronics Company)

Luckey Simulator, set to maintain a solution temperature of $34^{\circ}\text{C} \pm 0.2^{\circ}\text{C}$. (Luckey Laboratories, Inc.)

Mouthpieces; Evidence Card. (CMI, Incorporated)

Authorized Breath Alcohol Analysis with this Instrument:

Immediate analysis of breath samples collected by direct expiration by the subject into the instrument in which the measurement of alcohol concentration is performed.

Approved Instrument and Model Number

Intoxilyzer Model 4011A

Manufacturer:

CMI, Incorporated
P.O. Drawer D, Old Hwy 6
Minturn, Colorado 81645

*Formerly manufactured by Omicron Systems Corporation.

**Formerly manufactured by Stephenson Corporation.

Related Accessories Approved for this Instrument:

Mark II Breath Alcohol Simulator*, set to maintain a solution temperature of $34^{\circ}\text{C} \pm 0.2^{\circ}\text{C}$, and modified to have outlet tube tightly secured to the Simulator outlet. (Smith and Wesson Electronics Company)

Mark IIA Breath Alcohol Simulator, set to maintain a solution temperature of $34^{\circ}\text{C} \pm 0.2^{\circ}\text{C}$. (Smith and Wesson Electronics Company)

Lucker Simulator, set to maintain a solution temperature of $34^{\circ}\text{C} \pm 0.2^{\circ}\text{C}$. (Luckey Laboratories, Inc.)

Mouthpieces; Evidence Card. (CMI, Incorporated)

Authorized Breath Alcohol Analysis with this Instrument:

Immediate analysis of breath samples collected by direct expiration by the subject into the instrument in which the measurement of alcohol concentration is performed.

Approved Instrument and Model Number

Intoxilyzer Model 4011-AR

Manufacturer:

CMI, Incorporated
P.O. Drawer D, Old Hwy 6
Minturn, Colorado 81645

Related Accessories Approved for this Instrument:

Mark II Breath Alcohol Simulator*, set to maintain a solution temperature of $34^{\circ}\text{C} \pm 0.2^{\circ}\text{C}$, and modified to have outlet tube tightly secured to the Simulator outlet. (Smith and Wesson Electronics Company)

Mark IIA Breath Alcohol Simulator, set to maintain a solution temperature of $34^{\circ}\text{C} \pm 0.2^{\circ}\text{C}$. (Smith and Wesson Electronics Company)

Luckey Simulaor, set to maintain a solution temperature of $34^{\circ}\text{C} \pm 0.2^{\circ}\text{C}$. (Luckey Laboratories, Inc.)
Mouthpieces; Evidence Card. (CMI, Incorporated)

*Formerly manufactured by Stephenson Corporation.

Authorized Breath Alcohol Analysis with this Instrument:

Immediate analysis of breath samples collected by direct expiration by the subject into the instrument in which the measurement of alcohol concentration is performed.

Approved Instrument and Model Number

Intoxilyzer Model 4011-AW

Manufacturer:

CMI, Incorporated
P.O. Drawer D,
Old Hwy 6
Minturn, Colorado 81645

Modified by:

State of California
Department of Justice
Bureau of Forensic
Services
P.O. Box 133337
Sacramento, CA 95813

Related Accessories Approved for this Instrument:

Mark II Breath Alcohol Simulator*, set to maintain a solution temperature of $34^{\circ}\text{C} + / - 0.2^{\circ}\text{C}$, and modified to have outlet tube tightly secured to the Simulator outlet. (Smith and Wesson Electronics Company)

Mark IIA Breath Alcohol Simulator, set to maintain a solution temperature of $34^{\circ}\text{C} + / - 0.2^{\circ}\text{C}$. (Smith and Wesson Electronics Company)

Luckey Simulator, set to maintain a solution temperature of $34^{\circ}\text{C} + / - 0.2^{\circ}\text{C}$. (Luckey Laboratories, Inc.)

Mouthpieces; Evidence Card. (CMI, Incorporated)

Authorized Breath Alcohol Analysis with this Instrument:

Immediate analysis of breath samples collected by direct expiration by the subject into the instrument in which the measurement of alcohol concentration is performed.

*Formerly manufactured by Stephenson Corporation.

Approved Instrument and Model Number:

*Intoximeter Field Crimper-Indium Tube
Encapsulation Kit*

(No Model Number Designated)

Manufacturer:

CalDetect, Inc.
101 West Nevin Avenue
Richmond, CA 94801

Related Accessories Approved for this Instrument:

Mark II Breath Alcohol Simulator*, set to maintain a solution temperature of $34^{\circ}\text{C} + / - 0.2^{\circ}\text{C}$. (Smith and Wesson Electronics Company)

Mark IIA Breath Alcohol Simulator, set to maintain a solution temperature of $34^{\circ}\text{C} + / - 0.2^{\circ}\text{C}$. (Smith and Wesson Electronics Company)

Gas Chromatograph Intoximeter Mark II with or without Digital Concentration Readout Accessory. (CalDetect, Inc.)

Intoximeter Waste Bag Assembly with Check Valve and Restrictor. (CalDetect, Inc.)

Authorized Breath Alcohol Analysis with this Instrument:

Analysis of breath samples collected with this breath alcohol capturing device designed for entrapment of the alcohol in a breath sample for later analysis.

Restriction: No more than 14 days shall elapse between the time a sample is captured by the Intoximeter Field Crimper-Indium Tube Encapsulation Kit and the time that sample is analyzed in Gas Chromatograph Intoximeter Mark II or Gas Chromatograph Intoximeter Mark IV.

*Formerly manufactured by Stephenson Corporation.

State Department of Health*
Clinical Chemistry Laboratory

LIST OF INSTRUMENTS AND RELATED
ACCESSORIES APPROVED FOR BREATH
ALCOHOL ANALYSIS

Date of Preparation of this List: June 6, 1978

Section 1221.3(c) of the Regulations Relating to Forensic Alcohol Analysis and Breath Alcohol Analysis, contained in Title 17 of the California Administrative Code, states that only such instruments as have been approved by the California State Department of Health shall be used for breath alcohol analysis in this State; approval shall be based on laboratory evaluation by the Department of such instruments' ability to meet the standards of performance set forth in Section 1221.2 of the regulations.

The following is the list of instruments and related accessories which are so approved. This list supersedes and replaces the list published on August 8, 1973. Instruments are named in alphabetical order. Source or sources of accessories are shown in parentheses.

Approved Instrument and Model Number:

Alco-Analyzer Gas Chromatograph

(No Model Number Designated)

Manufacturer:

Luckey Laboratories, Inc.
7252 Osburn Road
San Bernardino, CA 92404

Related Accessories Approved for this Instrument:

Luckey Simulator, set to maintain a solution temperature of $34^{\circ}\text{C} + / - 0.2^{\circ}\text{C}$. (Luckey Laboratories, Inc.)

Luckey 5-inch Gas Chromatograph Chart Recorder and Sola Transformer. (Luckey Laboratories, Inc.)

*On and after July 1, 1978, this Department will be named the State Department of Health Services.

Authorized Breath Alcohol Analysis with this Instrument:

Immediate analysis of breath samples collected by direct expiration by the subject into the instrument in which the measurement of alcohol concentration is performed.

Approved Instrument and Model Number:

*Breathalyzer Model 900**

Manufacturer:

Smith and Wesson Electronics Company
2100 Roosevelt Avenue
Springfield, Massachusetts 01101

Related Accessories Approved for this Instrument:

Equilibrator*. (Smith and Wesson Electronics Company)

Mark II Breath Alcohol Simulator*, set to maintain a solution temperature of $34^{\circ}\text{C} +/ - 0.2^{\circ}\text{C}$. (Smith and Wesson Electronics Company)

Mark IIA Breath Alcohol Simulator, set to maintain a solution temperature of $34^{\circ}\text{C} +/ - 0.2^{\circ}\text{C}$. (Smith and Wesson Electronics Company)

Breathalyzer Solution Ampoules, Mouthpieces, and Bubblers; Breathalyzer Model 900 Test Records; Output Gauge* and Ampoule Gauge*. (Smith and Wesson Electronics Company)

Authorized Breath Alcohol Analysis with this Instrument:

Immediate analysis of breath samples collected by direct expiration by the subject into the instrument in which the measurement of alcohol concentration is performed.

*Formerly manufactured by Stephenson Corporation.

Approved Instrument and Model Number:

Breathalyzer Model 900A

Manufacturer:

Smith and Wesson Electronics Company
2100 Roosevelt Avenue
Springfield, Massachusetts 01101

Related Accessories Approved for this Instrument:

Mark II Breath Alcohol Simulator*, set to maintain a solution temperature of $34^{\circ}\text{C} +/ - 0.2^{\circ}\text{C}$. (Smith and Wesson Electronics Company)

Mark IIA Breath Alcohol Simulator, set to maintain a solution temperature of $34^{\circ}\text{C} +/ - 0.2^{\circ}\text{C}$. (Smith and Wesson Electronics Company)

Breathalyzer Solution Ampoules, Mouthpieces, and Bubbler; Breathalyzer Model 900A Test Records; Output Gauge* and Ampoule Gauge*. (Smith and Wesson Electronics Company)

Authorized Breath Alcohol Analysis with this Instrument:

Immediate analysis of breath samples collected by direct expiration by the subject into the instrument in which the measurement of alcohol concentration is performed.

Approved Instrument and Model Number:

Gas Chromatograph Intoximeter Mark II

Manufacturer:

CalDetect, Inc.
101 West Nevin Avenue
Richmond, CA 94801

*Formerly manufactured by Stephenson Corporation.

Related Accessories Approved for this Instrument:

Mark II Breath Alcohol Simulator*, set to maintain a solution temperature of $34^{\circ}\text{C} + / - 0.2^{\circ}\text{C}$. (Smith and Wesson Electronics Company)

Mark IIA Breath Alcohol Simulator, set to maintain a solution temperature of $34^{\circ}\text{C} + / - 0.2^{\circ}\text{C}$. (Smith and Wesson Electronics Company)

Digital Concentration Readout Accessory. (CalDetect, Inc.)

External Chart Recorder, MPI Model MP-1027. (Cal-Detect, Inc.)

Mouthpieces; Intoximeter Waste Bag Assembly with Check Valve and Restrictor; Plug-In Calibrator. (Cal-Detect, Inc.)

Authorized Breath Alcohol Analysis with this Instrument:

Immediate analysis of breath sample collected by direct expiration by the subject into the instrument in which the measurement of alcohol concentration is performed.

Also, analysis of breath samples which are collected with an Intoximeter Field Crimper-Indium Tube Encapsulation Kit, a breath alcohol capturing device designed for entrapment of the alcohol in a breath sample for later analysis using a Gas Chromatograph Intoximeter Mark II.

Approved Instrument and Model Number:

*Intoxilyzer Model 4011**

Manufacturer:

CMI, Incorporated
P.O. Drawer D, Old Hwy 6
Minturn, Colorado 81645

*Formerly manufactured by Stephenson Corporation.

Related Accessories Approved for this Instrument:

Mark II Breath Alcohol Simulator**, set to maintain a solution temperature of $34^{\circ}\text{C} +/\!- 0.2^{\circ}\text{C}$, and modified to have outlet tube tightly secured to the Simulator outlet. (Smith and Wesson Electronics Company)

Mark IIA Breath Alcohol Simulator, set to maintain a solution temperature of $34^{\circ}\text{C} +/\!- 0.2^{\circ}\text{C}$. (Smith and Wesson Electronics Company)

Luckey Simulator, set to maintain a solution temperature of $34^{\circ}\text{C} +/\!- 0.2^{\circ}\text{C}$. (Luckey Laboratories, Inc.)

Mouthpieces; Evidence Card. (CMI, Incorporated)

Authorized Breath Alcohol Analysis with this Instrument:

Immediate analysis of breath samples collected by direct expiration by the subject into the instrument in which the measurement of alcohol concentration is performed.

Approved Instrument and Model Number:

*Intoximeter Field Crimper-Indium Tube
Encapsulation Kit*

(No Model Number Designated)

Manufacturer:

CalDetect, Inc.
101 West Nevin Avenue
Richmond, CA 94801

Related Accessories Approved for this Instrument:

Mark II Breath Alcohol Simulator**, set to maintain a solution temperature of $34^{\circ} +/\!- 0.2^{\circ}\text{C}$. (Smith and Wesson Electronics Company)

*Formerly manufactured by Omicron Systems Corporation.

**Formerly manufactured by Stephenson Corporation.

Mark IIA Breath Alcohol Simulator, set to maintain a solution temperature of $34^{\circ}\text{C} \pm 0.2^{\circ}\text{C}$. (Smith and Wesson Electronics Company)

Gas Chromatograph Intoximeter Mark II with or without Digital Concentration Readout Accessory. (CalDetect, Inc.)

Intoximeter Waste Bag Assembly with Check Valve and Restrictor. (CalDetect, Inc.)

Authorized Breath Alcohol Analysis with this Instrument:

Analysis of breath samples collected with this breath alcohol capturing device designed for entrapment of the alcohol in a breath sample for later analysis.

Restriction: No more than 14 days shall elapse between the time a sample is captured by the Intoximeter Field Crimper-Indium Tube Encapsulation Kit and the time that sample is analyzed in Gas Chromatograph Intoximeter Mark II.

State of California
Department of Health

LIST OF INSTRUMENTS AND RELATED
ACCESSORIES APPROVED FOR BREATH
ALCOHOL ANALYSIS

Date of Preparation of this List: August 8, 1973.

Section 1221.3 of the Regulations Relating to Forensic Alcohol Analysis, contained in Title 17 of the California Administrative Code, states that only such instruments as have been approved by the California State Department of Health shall be used for breath alcohol analysis in this State; approval shall be based on laboratory evaluation by the Department of such instruments' ability to

meet the standards of performance set forth in Section 1221.2 of the Regulations.

The following is the list of instruments and related accessories which are so approved. This list supersedes and replaces the list published on December 31, 1971. Instruments are named in alphabetical order.

Approved Instrument and Model Number:

Alco-Analyzer Gas Chromatograph

(No Model Number Designated)

Manufacturer:

Luckey Laboratories, Inc.
7252 Osburn Road
San Bernardino, California 92404

Related Accessories Approved for this Instrument:

Luckey Simulator, set to maintain a solution temperature of $34^{\circ}\text{C} + / - 0.2^{\circ}\text{C}$. (Luckey Laboratories, Inc.)*

Luckey 5-inch Gas Chromatograph Chart Recorder and Sola Transformer. (Luckey Laboratories, Inc.)

Authorized Breath Alcohol Analysis with this Instrument:

Immediate analysis of breath samples collected by direct expiration by the subject into the instrument in which the measurement of alcohol concentration is performed.

Approved Instrument and Model Number:

Breathalyzer Model 900

Manufacturer:

Smith and Wesson Electronics Company
Meridian Road
Eatontown, New Jersey 07724

*Source or sources of accessories shown in parentheses.

Related Accessories Approved for this Instrument:

Equilibrator. (Smith and Wesson Electronics Company; Stephenson Corporation)

Mark II Breath Alcohol Simulator, set to maintain a solution temperature of $34^{\circ}\text{C} + / - 0.2^{\circ}\text{C}$. (Smith and Wesson Electronics Company; Stephenson Corporation)

Breathalyzer Solution Ampoules, Mouthpieces, and Bubbliers; Breathalyzer Model 900 Test Records; Output Gauge and Ampoule Gauge. (Smith and Wesson Electronics Company; Stephenson Corporation)

Authorized Breath Alcohol Analysis with this Instrument:

Immediate analysis of breath samples collected by direct expiration by the subject into the instrument in which the measurement of alcohol concentration is performed.

Approved Instrument and Model Number:

Breathalyzer Model 400

Manufacturer:

This instrument is no longer being manufactured. Its manufacturer was:

Stephenson Corporation
Box 1000
Red Bank, New Jersey 07701

Related Accessories Approved for this Instrument:

Equilibrator. (Smith and Wesson Electronics Company; Stephenson Corporation)

Mark II Breath Alcohol Simulator, set to maintain a solution temperature of $34^{\circ}\text{C} + / - 0.2^{\circ}\text{C}$. (Smith and Wesson Electronics Company; Stephenson Corporation)

Breathalyzer Solution Ampoules, Mouthpieces, and Bubbliers; Breathalyzer Model 400 Test Records; Out-

put Gauge and Ampoule Gauge. (Smith and Wesson Electronics Company; Stephenson Corporation)

Authorized Breath Alcohol Analysis with this Instrument:

Immediate analysis of breath samples collected by direct expiration by the subject into the instrument in which the measurement of alcohol concentration is performed.

Approved Instrument and Model Number:

Gas Chromatograph Intoximeter Mark II

Manufacturer:

Intoximeters, Inc.
1901 Locust Street
St. Louis, Missouri 63103

Related Accessories Approved for this Instrument:

Mark II Breath Alcohol Simulator, set to maintain a solution temperature of $34^{\circ}\text{C} + / - 0.2^{\circ}\text{C}$. (Smith and Wesson Electronics Company; Stephenson Corporation)

Digital Concentration Readout Accessory. (Intoximeters, Inc.)

External Chart Recorder, MPI Model MP-1027. (Intoximeters, Inc.)

Mouthpieces; Intoximeter Waste Bag Assembly with Check Valve and Restrictor; Plug-in Calibrator. (Intoximeters, Inc.)

Authorized Breath Alcohol Analysis with this Instrument:

Immediate analysis of breath sample collected by direct expiration by the subject into the instrument in which the measurement of alcohol concentration is performed.

Also, analysis of breath samples which are collected with an Intoximeter Field Crimper-Indium Tube Encapsulation Kit, a breath alcohol capturing device de-

signed for entrapment of the alcohol in a breath sample for later analysis using a Gas Chromatograph Intoximeter Mark II.

Approved Instrument and Model Number:

Intoxilyzer Model 4011

Manufacturer:

Omicron Systems Corporation
1052 East Meadow Circle
Palo Alto, California 94303

Related Accessories Approved for this Instrument:

Mark II Breath Alcohol Simulator, set to maintain a solution temperature of $34^{\circ}\text{C} + / - 0.2^{\circ}\text{C}$. (Omicron Systems Corporation)

Luckey Simulator, set to maintain a solution temperature of $34^{\circ}\text{C} + / - 0.2^{\circ}\text{C}$. (Luckey Laboratories, Inc.)

Mouthpieces; Evidence Card. (Omicron Systems Corporation)

Authorized Breath Alcohol Analysis with this Instrument:

Immediate analysis of breath samples collected by direct expiration by the subject into the instrument in which the measurement of alcohol concentration is performed.

Approved Instrument and Model Number:

*Intoximeter Field Crimper-Indium Tube
Encapsulation Kit*

(No Model Number Designated)

Manufacturer:

Intoximeters, Inc.
1901 Locust Street
St. Louis, Missouri 63103

Related Accessories Approved for this Instrument:

Mark II Breath Alcohol Simulator, set to maintain a solution temperature of $34^{\circ}\text{C} + / - 0.2^{\circ}\text{C}$. (Smith and Wesson Electronics Company; Stephenson Corporation)

Gas Chromatograph Intoximeter Mark II with or without Digital Concentration Readout Accessory. (Intoximeters, Inc.)

Intoximeter Waste Bag Assembly with Check Valve and Restrictor. (Intoximeters, Inc.)

Authorized Breath Alcohol Analysis with this Instrument:

Analysis of breath samples collected with this breath alcohol capturing device designed for entrapment of the alcohol in a breath sample for later analysis.

Restriction: No more than 14 days shall elapse between the time a sample is captured by the Intoximeter Field Crimper-Indium Tube Encapsulation Kit and the time that sample is analyzed in Gas Chromatograph Intoximeter Mark II.

EXHIBIT F

COLORADO DEPARTMENT OF HEALTH
4210 East 11th Avenue, Denver, Colorado 80220
Phone 388-6111

Edward G. Dreyfus, M.D., M.P.H. Executive Director

NOTICE OF FINAL ADOPTION RULES
AND REGULATIONS RELATING TO CHEMICAL
TESTS FOR BLOOD ALCOHOL
IMPLIED CONSENT LAW

Pursuant to the provisions of section 3-16-2(11) (k),
Colorado Revised Statutes, 1963, as amended, NOTICE

is hereby given that on October 17, 1973 the Colorado State Board of Health adopted certain rules subsequent to public hearings held pursuant to and in accordance with due and proper legal notice.

The rules adopted by the board are captioned as follows:

**RULES AND REGULATIONS RELATING TO
CHEMICAL TESTS FOR BLOOD ALCOHOL,
IMPLIED CONSENT LAW.**

A copy of said rules, as adopted by the board, is attached and made a part of this notice.

The legal authority for the board to adopt the rules is contained in section 13-5-30, Colorado Revised Statutes, 1963, as amended.

The effective date of said rules will be twenty (20) days after the date upon which this notice is published.

Dated this 19th day of June, 1974, at Denver, Colorado.

/s/ E. G. Dreyfus
EDWARD G. DREYFUS, M.D., M.P.H.
Secretary,
Colorado State Board of Health

EGD:MPI:sks
Encl.
(Legal List)

Effective Date: July 9, 1974

**RULES AND REGULATIONS
OF THE COLORADO STATE BOARD OF HEALTH
RELATING TO CHEMICAL TESTS FOR BLOOD
ALCOHOL IMPLIED CONSENT LAW**

The following rules and regulations shall govern the obtaining of blood, urine, and breath specimens and making

chemical tests and analysis thereof to determine blood alcohol, carbon monoxide, and drug content by proper methods and procedures pursuant to Section 13-5-30, Colorado Revised Statutes 1963, as amended, and rescind subject regulations effective October 1, 1971.

I. Sample Collection

A. Living Persons

1. Blood

- (a) The blood sample shall be collected by venipuncture only by persons authorized by law, and by means of a sterile syringe and hypodermic needle or other equipment of equivalent sterility. The skin at the area of puncture shall be thoroughly cleansed and disinfected, but shall not be sterilized with alcohol, alcoholic solutions or phenol. The sample thus obtained shall be dispensed or collected directly into two sterile tubes containing sufficient sodium fluoride as an anticoagulant and antibacterial agent so that the final concentration shall contain not less than 1% sodium fluoride. The blood sample shall be properly mixed with the anticoagulant, sealed, and labeled. The sample thus taken and sealed shall, at all times thereafter, be handled in such a manner that the "chain of evidence" may be preserved.

- (b) The blood sample shall be delivered to a laboratory certified by the Department of Health to conduct tests for alcohol content. At the laboratory the seal shall be broken on the container and one tube of blood shall be opened and analyzed while the second tube of blood shall be retained in storage at 4°C or less for a period of not less than one year for further studies if needed.
- (c) The test must be completed within ten (10) days of collection of the specimen.

2. *Urine*

- (a) Urine specimens shall be collected in the presence of the arresting officer or other responsible person who can authenticate the sample. The sample shall be collected as follows:

The patient shall empty his bladder and the urine be discarded. A urine sample shall be obtained 20 minutes following emptying the bladder. Twenty minutes later a second urine sample shall be obtained. These two urine samples shall be placed in urine containers with sufficient sodium fluoride as a preservative so that the final concentration shall be not less than 1% sodium fluoride. The urine sample shall be properly mixed with the preservative, sealed, and labeled. The sample thus taken and sealed shall, at all times thereafter, be handled in such a manner that the "chain of evidence" may be preserved.

- (b) Urine samples shall be delivered to a laboratory certified by the Department of Health to conduct tests for alcohol.
- (c) The tests must be completed within ten (10) days of collection of the specimen. Upon completion of the analysis, the specimen shall be retained in storage at a temperature of 4°C or less for a period of not less than one year for further studies.

3. *Breath*

Breath samples shall be appropriately collected for testing in mechanical devices in facilities certified by the Colorado Department of Health.

B. *Dead Persons*

A blood and urine specimen, if available, from any person who is dead as the result of a motor vehicle accident, shall be obtained and tested as required by the State Board of Health Rules and Regulations pertaining to C.R.S. 13-5-161.

II. *Prescribed Test Method*

A. *Alcohol*

Body fluids for ethyl alcohol content by weight shall be tested using gas chromatographic procedures or other methods of equivalent precision and accuracy. Laboratories using methods which produce satisfactory grades in the Department of

Health Alcohol Test Evaluation Program shall be considered to have used methods having acceptable precision and accuracy.

Breath specimens shall be analyzed in mechanical devices in accordance with the manufacturer's instructions and operations manual, and in accordance with the special instructions as may be issued by the Colorado Department of Health. Each and every breath testing instrument shall be inspected and performance evaluated annually by the Colorado Department of Health.

III. *Certified Laboratories*

- A. The Colorado Department of Health Laboratory is certified to conduct such tests.
- B. Other laboratories may be certified to conduct such tests subject to the following standards and procedures.
 1. Laboratories under the direct supervision and direction of a clinical pathologist upon presentation of evidence of satisfactory participation in a national quality control program in toxicology or satisfactory participation in the Alcohol Test Evaluation Program provided by the Department of Health shall be certified.
 2. Laboratories which are licensed for toxicology under the Federal Clinical Laboratories Improvement Act of 1967, and which give evidence of satisfactory participation in a national quality control program in toxicol-

ogy or the Alcohol Test Evaluation Program provided by the Department of Health shall be certified.

3. Other laboratories shall furnish the Department of Health evidence concerning the scientific training and experience in clinical chemistry of its director and shall present evidence of satisfactory participation in a national quality control program in toxicology or in the Alcohol Test Evaluation Program provided by the Department of Health. Prior to approval at least ten (10) specimens distributed by the Department of Health shall be analyzed for the presence of alcohol. The results on at least 90% of the quantitatively analyzed samples shall be within 10% of the actual amount of alcohol contained in the specimen.

C. Law Enforcement Agencies

Law enforcement agencies may be certified to conduct tests for blood alcohol content by breath testing procedures pursuant to the following regulations.

1. Officers conducting the tests shall have had training in the operation of the breath testing machines.
2. Prior to certification and annually thereafter, a proficiency test of the machine shall be conducted by the State Health Department with the results of at least 90% of the specimens analyzed falling within 10% of the alcoholic content of the specimen.

D. General Requirements

1. Application for certification to conduct chemical tests for alcohol under these regulations shall be made by letter application to the Department of Health. Application for annual recertification shall be submitted by December 1st (first) of each year.
2. The laboratory director shall be directly responsible for the accuracy of the laboratory tests performed as well as the accuracy of the reports issued.
3. Each certified laboratory shall have adequate space, equipment, reagents and controls available for the performance of the tests. It shall give evidence of the utilization of a written method of analysis to carry out the tests required under these regulations.
4. Each laboratory shall be subject to inspection by authorized personnel of the Department of Health prior to certification and may be reinspected at any time.
5. Certified laboratories may from time to time be subjected to performance tests conducted in a manner prescribed by the Executive Director of the Department of Health. Each laboratory shall have access to the records of its own performance test results.
6. The State Board of Health may refuse to renew its certification or may suspend or revoke its certification of any laboratory after

notice and hearing held pursuant to the provision of Article 16, Ch. 3, CRS 1963, as amended, for any one or more of the following causes:

- (a) Fraud or deceit in applying for or obtaining the certification or any renewal thereof;
 - (b) Conviction of any crime involving moral turpitude;
 - (c) Gross incompetence or negligent malpractice;
 - (d) Willful or repeated violation of any lawful rule, regulation, or order of the State Board of Health or its officers;
 - (e) Inadequate facilities or equipment;
 - (f) Inadequate scores on any performance tests conducted in a manner prescribed by the Executive Director of the Department of Health.
7. Records shall be kept and maintained by the laboratory which reflect the pertinent facts relating to tests performed and they shall be open to inspection by authorized personnel of the Department of Health.

COLORADO DEPARTMENT OF HEALTH

Richard D. Lamm
Governor

Frank A. Traylor, M.D.
Executive Director

CERTIFICATE

I, FRANK A. TRAYLOR, of the Colorado Department of Health hereby certify that the attached "Rules and Regulations Relating to Chemical Tests for Blood Alcohol-Implied Consent Law" is a true and correct reproduced copy of the rules and regulations adopted by the State Board of Health February 20, 1980, effective March 31, 1980, and have remained in full force and effect without change through the date of execution hereof.

That said rules have been approved by the Colorado Attorney General as to legality and constitutionality and were duly filed in the Office of the Secretary of State as made and were published in the Code of Colorado Regulations as provided by law.

Date April 27, 1981.

/s/ Frank A. Traylor, Jr.
Frank A. Traylor, Jr., M.D.
Executive Director

4210 East 11th Avenue, Denver, Colorado 80220
Phone (303) 320-8333

RULES AND REGULATIONS
OF THE COLORADO BOARD OF HEALTH
RELATING TO CHEMICAL TESTS FOR BLOOD
ALCOHOL IMPLIED CONSENT LAW, 5-CCR-1005-2

The following rules and regulations shall govern the obtaining of blood, urine, and breath specimens and making chemical tests and analysis thereof to determine blood alcohol by proper methods and procedures pursuant to Colorado Revised Statutes 1973, 42-4-1202, as amended, and rescind subject regulations effective July 9, 1974.

I. Sample Collection

A. Living Persons

1. Blood

- a. Blood samples shall be collected in the presence of the arresting officer or other responsible person who can authenticate the samples. Blood samples shall be collected by venipuncture by a physician, a registered nurse, or a person whose normal duties include withdrawing blood samples under the supervision of a physician or registered nurse. Blood samples shall be collected using a sterile syringe and hypodermic needle or other equipment of equivalent sterility. The skin at the area of puncture shall be thoroughly cleansed and disinfected with an aqueous solution of nonvolatile antiseptic. Alcohol or phenolic solutions shall not be used as a skin antiseptic. The samples thus obtained shall be dispensed or collected directly into two sterile tubes containing sufficient sodium fluoride as an anticoagulant and antibacterial agent so that the final concentration shall contain not less than 1% sodium fluoride. The blood samples shall be properly mixed with the sodium fluoride, sealed and labeled. The identity and integrity of the samples shall be maintained through collection to analysis and reporting.

- b. The blood samples shall be delivered to a laboratory certified by the Colorado Department of Health, Division of Laboratories, to conduct test(s) for alcohol content. At the laboratory the seal shall be broken on one tube and the blood shall be analyzed. The test(s) must be completed within ten (10) days of collection of the specimen. The second tube of blood shall be retained by the laboratory at 4°C or less for a period of not less than one year. The saved samples shall be made available to the defendant upon request.

2. Urine

- a. Urine samples shall be collected in the presence of the arresting officer or other responsible person who can authenticate the samples. The samples shall be collected as follows:

The subject shall empty his bladder and the urine be discarded. Twenty (20) minutes after first voiding the bladder a urine sample shall be collected in a clean container and dispensed into two (2) tubes containing antibacterial agent(s). Twenty (20) minutes after the second voiding a second urine sample shall be collected in a clean container. These two urine samples shall each be placed into two urine containers with sufficient sodium fluoride as a preservative so that the final concentration shall not

be less than 1% sodium fluoride. The four urine samples shall be mixed with the preservative, sealed, and labeled. The identity and integrity of the samples shall be maintained through collection to analysis and reporting.

- b. The urine samples shall be delivered to a laboratory certified by the Colorado Department of Health, Division of Laboratories, to conduct tests for alcohol content. At the laboratory the seals shall be broken on one urine sample from each of the voidings and analyzed. The test must be completed within ten (10) days of collection of the specimens. The second set of two urine samples shall be retained at 4°C or less for a period of not less than one year. The saved samples shall be made available to the defendant upon request.

3. Breath

- a. Breath samples shall be collected by certified operators only and shall be expired breath which is essentially alveolar in composition. Breath samples shall be collected only after the subject has been under continuous observation for at least twenty (20) minutes prior to collection of the breath sample. During this time the subject must not belch, regurgitate, or take any foreign substance by nose or mouth. If such occurs another twenty

(20) minutes must elapse prior to collection.

- b. One breath sample shall be used for the direct breath test for blood alcohol concentration or for a delayed test to be analyzed within ten (10) days of collection.
- c. A sample of the subject's breath or the alcoholic content therefrom shall be collected pursuant to the procedures in the Appendices. The samples shall be saved for a period of not less than one year. The saved sample shall be made available to the defendant upon request.

B. Dead Persons

A blood and urine specimen, if available, from any person who is dead as the result of a motor vehicle or aircraft accident, shall be obtained and tested as required by the State Board of Health Rules and Regulations pertaining to C.R.S. 1973, 42-4-1211, as amended.

II. Methods of Alcohol Analysis

A. Alcohol in Body Fluids

- 1. The method used shall be capable of analyzing reference samples of known alcohol concentration within accuracy and precision limits of plus or minus 10% of the actual blood alcohol concentration.

2. All analytical results shall be expressed in terms of the alcohol concentration in blood, based on the number of grams of alcohol per 100 cubic centimeters or per 100 milliliters of blood.
3. A urine alcohol concentration shall be converted to an equivalent blood alcohol concentration by a calculation based on alcohol in urine to alcohol in blood ratio of 1.3:1.

B. Alcohol In Breath Samples—Minimum Requirements for Direct Breath Test

1. Breath samples shall be collected by certified operators only in instruments and equipment approved by the Colorado Department of Health, Division of Laboratories.
2. On or after July 1, 1980, all organizations selling or offering for sale instruments for blood alcohol analysis by breath means in this State shall register such instruments with the Colorado Department of Health. On or after January 1, 1981, only such instruments as have been approved by the Colorado Department of Health shall be used for blood alcohol testing by breath means in this State. Approval or disapproval shall be based on laboratory evaluation by the Colorado Department of Health of such instruments' ability to meet the standards of performance set forth in these regulations.
3. A system blank analysis shall be used in connection with each direct breath test.

4. A suitable reference sample, such as air equilibrated with a reference solution of known alcohol content at a known temperature must be used with each direct breath test. The result of such analysis must agree with the reference sample value within the limits of $\pm 10\%$ w/v.
5. The instruments shall be maintained and calibration checked periodically by the Operator Instructor. Periodic calibration checks shall be at least monthly and be exclusive of the tests analyzed by the instrument.
6. The method used shall be capable of analyzing reference samples of known alcohol concentration within accuracy and precision limits of plus or minus 10% of the actual alcohol concentration.
7. Standardized records shall be kept for each instrument to show maintenance performed, calibration tests, analyses performed, results and identities of the persons performing analyses.
8. Colorado Department of Health, Division of Laboratories shall review and prescribe the Operational Checklist and Procedures to be used with breath testing devices for blood alcohol testing. The Operational Checklists and Procedures are found in the Appendices.
9. A blood alcohol concentration by analysis of a breath specimen shall be converted to an

equivalent blood alcohol concentration ratio of 1 to 2100. All analytical results shall be expressed in terms of the alcohol concentration in blood, based on the number of grams of alcohol per 100 cubic centimeters or per 100 milliliters. % and % w/v shall be regarded as acceptable abbreviations of the phrase, grams per 100 cubic centimeters or grams per 100 milliliters.

III. Certified Facilities

- A. The Colorado Department of Health, Division of Laboratories, is certified to conduct blood alcohol tests.
- B. Other facilities may be certified to conduct blood alcohol tests subject to the following standards and procedures.
 - 1. Laboratories seeking certified status shall furnish the Department of Health, Division of Laboratories, in writing evidence concerning the scientific training and experience in clinical chemistry of its director and personnel performing blood alcohol tests. Colorado Department of Health, Division of Laboratories, shall provide to the requesting facility ten (10) specimens which shall be analyzed for alcohol content. For certification the results of at least 90% of the quantitatively analyzed samples shall be within 10% of the actual amount of alcohol contained in the specimen. Certificates shall be issued to laboratories successfully completing the proficiency testing.

2. A proficiency testing of all laboratories shall be conducted annually by the Colorado Department of Health, Division of Laboratories. Performance is considered satisfactory if the results of at least 90% of the specimens analyzed fall within 10% of the alcoholic content of the specimen. Continued certification of the laboratory will depend on satisfactory performance in the annual proficiency testing.

C. Law Enforcement Agencies

1. Law enforcement agencies may be certified to conduct blood alcohol tests by breath testing procedures.
2. Prior to certification of the instrument and annually thereafter, a proficiency test of the instrument shall be conducted by the Colorado Department of Health, Division of Laboratories, with the results of at least 90% of the specimens analyzed falling within 10% of the alcoholic content of the specimen.
3. Personnel conducting the tests shall be certified in the operation of the breath testing instrument(s).

IV. Certified Operators of Breath Test Equipment

A. Certification of Operators of Breath Testing Instruments to Determine Blood Alcohol Concentration

1. Operators who have certificates of training in breath testing to determine blood alcohol

concentration issued from the Colorado Department of Health, Division of Laboratories, prior to the adoption of these rules and regulations are considered certified operators subject to Section IV(A) (3).

2. Certified operators shall have a minimum of eight (8) hours of instruction to include the following:
 - a. Value and purpose of blood alcohol testing by breath means.
 - b. Physiological action of alcohol on the human body.
 - c. Pharmacology and Toxicology of alcohol.
 - d. Methods of alcohol analysis and Theory of Breath Testing.
 - e. Instruments and procedures for breath testing.
 - f. Laboratory Practice and Demonstration of Competency.
 - g. Court Testimony.
 - h. A comprehensive Practical and Written Examination to be administered by the Colorado Department of Health, Division of Laboratories.
3. To maintain proficiency on direct breath test instruments, the certified operator shall test a minimum of four (4) simulator solutions every six (6) months. The Operator Instructors will prepare the simulator solutions at

varying concentrations and shall also supervise the testing of same.

B. Certification of Operator Instructors

1. Certified Operator Instructors shall have a minimum of sixteen (16) hours of instruction to include the following:
 - a. Value and purpose of blood alcohol analysis and blood alcohol analysis by breath sampling.
 - b. Physiological action of alcohol on the human body.
 - c. Pharmacology and Toxicology of alcohol.
 - d. Instruments and Procedures for blood alcohol analysis.
 - e. Interpretation of results of alcohol analysis.
 - f. Court Testimony.
 - g. Laboratory methods of alcohol analysis.
 - h. Preparation of standard simulator solutions.
 - i. Operational principles of the selected breath testing instruments.
 - j. Instructor Training.
 - k. Laboratory Practice and Demonstration of Competency.
 - l. A comprehensive Practical and Written Examination to be administered by the Colorado Department of Health.

2. Duties of Certified Operator Instructors

Certified Operator Instructors shall be qualified to train and certify Operators of breath testing instruments. They shall give operator training and instruction classes following the course of instruction as outlined by the Colorado Department of Health, Division of Laboratories. Operator certification certificates will be issued by the Laboratory Division to individuals who successfully pass the course of instruction including tests designed, specified, and graded by personnel of the Colorado Department of Health, Division of Laboratories.

3. At least annually certified Operator Instructors shall give a certification and training class. Prior to the certification and training class, the Colorado Department of Health, Division of Laboratories, will test the Operator Instructor's proficiency on the breath testing device to be used.

V. General Requirements

- A. Initial application for certification to conduct chemical tests for alcohol under these regulations shall be made by letter to the Colorado Department of Health, Division of Laboratories.
- B. The Facility Director shall be directly responsible for the accuracy of the tests performed as well as the accuracy of the reports issued.
- C. Each certified facility shall have adequate space, equipment, materials, and controls available for

the performance of the tests. Each certified facility shall give evidence of the utilization of a written method of analysis to carry out the tests required under these regulations.

- D. Each facility shall be subject to inspection by authorized personnel of the Department of Health prior to certification and may be re-inspected at any time.
- E. Certified facilities may from time to time be subjected to performance tests conducted in a manner prescribed by the Colorado Department of Health, Director of Laboratories. Each facility shall have access to the records of its own performance test results.
- F. The State Board of Health may refuse to renew its certification or may suspend or revoke its certification of any facility after notice and hearing held pursuant to the provision of C.R.S. 1973, 24-4-104, as amended, for any one or more of the following causes:
 - 1. Fraud or deceit in applying for or obtaining the certification or any renewal thereof;
 - 2. Gross incompetence or negligent malpractice;
 - 3. Willful or repeated violation of any lawful rule, regulation, or order of the State Board of Health or its officers;
 - 4. Inadequate facilities or equipment;
 - 5. Inadequate scores on any performance tests conducted in a manner prescribed by the Colo-

rado Department of Health, Division of Laboratories.

- G. Records shall be kept and maintained by the facility which reflect the pertinent facts relating to tests performed and they shall be open to inspection by authorized personnel of the Colorado Department of Health, Division of Laboratories.
- H. The Colorado Department of Health, Division of Laboratories, shall publish annually a list of certified facilities which will be supplied to any interested party upon written request.

APPENDIX A

I. Operational Checklists and Procedures—Direct Breath Test(s)

A. Breathalyzer Model 900 and 900A Operational Check List

1. Observe subject for twenty (20) minutes prior to testing to prevent oral intake of any material.
2. Throw switch to the "ON" position. Wait until the thermometer shows $50^{\circ}\text{C} + / - 3^{\circ}\text{C}$.
3. Gauge reference ampoule and insert into left hand holder. Record ampoule control number.
4. Gauge test ampoule, open, insert bubbler and connect to outlet. Insert test record card. Record ampoule control number.
5. Turn to take and flush out. Turn to analyze.

6. When red empty signal lamp appears, wait ninety (90) seconds or until Read light comes on.
7. Turn light on and balance. Set blood alcohol pointer on start line.
8. Turn to take and attach standard simulator test to the breath tube. Analyze the simulator specimen. Simulator temperature is 34°C.
9. Repeat step number six (6).
10. Turn light on and balance. Record results.
11. Insert new test record card.
12. Repeat steps five (5) thru seven (7).
13. Turn to take. Attach a clean mouth piece to the breath tube. Have the subject blow with long sustained breaths. Turn to analyze.
14. Repeat step number six (6).
15. Turn light on and balance. Record results of subject's B.A.C.
16. Remove the test record card and record all information as needed.
17. Turn instrument "OFF". Turn control knob to off. Dispose of the test ampoule. Remove the reference ampoule.

B. Breathalyzer Model 1000 Operational Check List

1. Observe subject for twenty (20) minutes prior to testing to prevent oral intake on any material.

2. Advance switch to the reset position and allow the wait light to go out.
3. Gauge the reference ampoule and insert into the left hand ampoule holder. Record the ampoule control number.
4. Gauge the test ampoule, open, insert bubbler and connect to outlet. Record the ampoule control number. Close cover.
5. Insert ticket and advance switch to the run position.
6. When sample-blow light comes on, attach the standard simulator test to the breath tube. Analyze the simulator specimen. Simulator temperature is 34°C .
7. After cycle is complete return switch to the reset position.
8. Advance switch to the run position.
9. When sample-blow light comes on, attach a clean mouth piece to the breath tube. Have the subject blow with long sustained breaths until the instrument takes the sample for analysis.
10. After cycle is complete return the switch to the off position.
11. Remove the ticket and record all information as needed.
12. Dispose of the test ampoule. Remove the reference ampoule.

C. CMI Intoxilyzer Model 4011A and 4011AS Operational Check List

1. Observe the subject twenty (20) minutes prior to testing to prevent oral intake of any material.
2. Turn power switch on. Observe ready light on.
3. Insert the test record card.
4. Connect the breath tube to the pump tube.
5. Turn the mode selector switch to zero set. Depress and turn zero adjust knob so that the digital readout displays a $+.000$ to $+.003$.
6. Turn the mode selector switch to air blank.
7. After cycle is completed, turn the mode selector switch to zero set. Readjust zero set knob to obtain proper zero, $+.000$ to $+.003$.
8. Connect simulator to breath tube and pump tube. Turn mode selector switch to calibrator. Simulator temperature 34°C .
9. After calibrator cycle is completed, connect the breath tube to the pump tube. Turn mode selector to air blank.
10. After air blank cycle is completed, turn mode selector to zero set. Readjust zero set knob to obtain proper zero, $+.000$ to $+.003$.
11. Turn mode selector switch to the breath mode. Disconnect the breath tube from the pump tube. Place a clean mouthpiece on the

breath tube. Have the subject blow with long sustained breaths until breath cycle is completed.

12. Connect the breath tube to the pump tube. Remove the caps from a new silica gel tube and attach to the breath outlet. Turn the mode selector switch to the air blank position.
13. After the air blank cycle is completed, turn the mode selector switch to zero set. Remove the silica gel tube from the breath outlet and recap.
14. Turn the instrument off; remove the ticket and record all information as needed.

D. Luckey Alco-Analyzer Gas Chromatograph Operational Check List

1. Observe the subject for twenty (20) minutes prior to testing to prevent oral intake of any material.
2. Set the helium flow at the prescribed PSI. Check column temperature for proper setting.
3. Turn on the recorder and chart drive. Turn on the detector.
4. Set the recorder ink pen onto the paper and adjust to the prescribed baseline.
5. Place the analyze lever in the take position. Analyze the simulator specimen. Simulator temperature is 34°C. Place the analyze lever in the analyze position.

6. When pen return to baseline, place the analyze lever in the take position. Inject a blank air sample.
7. When pen returns to baseline, place the analyze lever in the take position. Attach a clean mouthpiece to the breath tube. Have subject blow with long sustained breaths. While whistle is sounding, place the analyze lever in the analyze position.
8. When pen returns to baseline repeat step number five (5).
9. When pen returns to baseline, roll chart forward and tear off recording of results and record all information as needed.
10. Turn helium to standby PSI. Turn off recorder, chart drive, and detector. Lift ink pen from paper.

E. Intoximeter MK II Gas Chromatograph Operational Check List

1. Observe subject for twenty (20) minutes prior to testing to prevent oral intake of any material.
2. Observe the red light on and the orange light on.
3. Turn the selector switch from stand-by to operate.
4. Push the ignite button until the green light comes on.

5. With the selector switch in the blank position push the analyze button. When green light comes back on permanently instrument is clear. Note the $+.000$ reading.
6. With the selector switch in the sample position analyze the standard simulator test. Simulator temperature is 34°C .
7. Repeat step number five (5).
8. Attach a clean mouth piece to the breath tube. Empty the air waste bag. Put the selector switch in the sample position.
9. Have the subject blow with long sustained breaths until the whistle sounds. While the whistle is sounding, push the analyze button.
10. When the recorder stops, move the chart forward and tear off the recording of results.
11. Record all information as needed.
12. Turn instrument to stand-by.

F. Intoximeter MK IV Gas Chromatograph Operational Check List

1. Observe subject for twenty (20) minutes prior to testing to prevent oral intake of any material.
2. Push green button to operate position. Steady green light comes on.
3. Digital readout is at $+.000$. If not push the red reset button and release.

4. Push and release the yellow analyze button. When recorder stops, the instrument is clear. Note the +.000 reading.
5. Analyze the known standard simulator test. Simulator temperature is 34°C.
6. Repeat step number four (4).
7. Attach a clean mouthpiece to the breath tube. Have the subject blow with long sustained breaths until the instrument takes the sample for analysis.
8. When the recorder stops, move the chart forward and tear off the recording of results.
9. Record all information as needed.
10. Turn instrument to stand-by.

APPENDIX B

II. Operational Checklists and procedures — Delayed Breath Test(s)

A. Indium Crimper Operational Checklist

1. Observe subject for twenty (20) minutes prior to testing to prevent oral intake of any material.
2. Open template bag, attach filter and check valve.
3. Attach handle and power cord. Mount template in crimper, and lock in place. Close lid and lock.

4. Plug in crimper and observe red light on. Allow fifteen (15) minutes or more warm up time. Red light will go off when ready.
5. Assemble mouthpiece to the waste bar and attached to filter.
6. Have subject blow with one long sustained breath until whistle sounds. With whistle sounding, squeeze crimper handle for several seconds.
7. Open crimper and note that at least one of the color bands on the jaw mounted temperature strip has appeared.
8. Remove the template and note the numbers on the indium webbing. Record the jaw numbers indicating a proper seal.
9. Place all parts in the box. Label and seal.
10. Complete the identification data as needed.

B. SM-7 Sobermeter "MOBAT"

1. Observe subject for twenty (20) minutes prior to testing to prevent oral intake of any material.
2. Remove and save the plastic caps from both ends of the silica gel collection tubes.
3. Pretest the volumetric bag (2100 cc) for leaks. If a leak is found, replace with a new volumetric bag.
4. Attach one end of a collection tube to the volumetric bag. Attach the other end of the collection tube to the end of the rubber bal-

loon which does not have the long plastic sleeve.

5. Direct the subject to inflate the balloon with long uninterrupted breath. Between each breath collapse the long plastic waste sleeve. The balloon will inflate, air will pass through the collection tube and collect in the volumetric bag. Allow air to flow until the volumetric bag is tight.
6. When the volumetric bag is filled twist the balloon shut at the end nearest the collection tube and remove the collection tube and volumetric bag. Expel all air from the volumetric bag and place the other collection tube on the balloon and attach the volumetric bag. Allow air to flow until the volumetric bag is filled. The subject may have to inflate the balloon if more air is needed to fill the second volumetric bag.
7. Remove the collection tube from the balloon FIRST and then from the volumetric bag. Replace the plastic caps on both collection tubes, expel the air from the volumetric bag, waste bag, and balloon.
8. Complete the identification data as needed.
9. Place all parts in the box. Label and seal.

C. SM-8 Sobermeter "Mini-MOBAT"

1. Observe the subject for twenty (20) minutes prior to testing to prevent oral intake of any material.

2. Remove and save the plastic caps from the ends of the silica gel collection tube.
3. Pretest the volumetric bag (525 cc) for leaks. If a leak is found, replace it with a new volumetric bag.
4. Attach one end of the collection tube to the volumetric bag. Attach the other end of the collection tube to the long plastic waste sleeve.
5. Direct the subject to inflate the volumetric bag with a long uninterrupted breath. Between each breath collapse the long plastic waste sleeve. Allow air to flow until the volumetric bag is tight.
6. Remove the collection tube from the plastic waste sleeve and then from the volumetric bag. Replace the plastic caps on both ends of the collection tube.
7. Complete the identification data as needed.
8. Place all parts in the envelope. Label and seal.

Adopted by the Colorado Board of Health
February 20, 1980

(State of Colorado Seal)

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Regulation Vehicles and Traffic

42-4-1202. Driving under the influence - driving while impaired implied consent to chemical tests - penalties. (1)

(a) It is a misdemeanor for any person who is under the influence of intoxicating liquor to drive any vehicle in this state.

(b) It is a misdemeanor for any person to drive any vehicle in this state while such person's ability to operate a vehicle is impaired by the consumption of alcohol.

(c) It is a misdemeanor for any person who is an habitual user of or under the influence of any narcotic drug or who is under the influence of any other drug to a degree which renders him incapable of safely operating a vehicle to drive a vehicle in this state. The fact that any person charged with a violation of this paragraph (c) is or has been entitled to use such drug under the laws of this state shall not constitute a defense against any charge of violating this paragraph (c).

(2) In any prosecution for a violation of subsection (1) (a) or (1) (b) of this section, the amount of alcohol in the defendant's blood at the time of the commission of the alleged offense or within a reasonable time thereafter, as shown by chemical analysis of the defendant's blood, urine, or breath, shall give rise to the following presumption:

(a) If there was at such time 0.05 percent or less by weight of alcohol in the defendant's blood, it shall be presumed that the defendant was not under the influence of intoxicating liquor and that his ability to operate a vehicle was not impaired by the consumption of alcohol.

(b) If there was at such time in excess of 0.05 percent but less than 0.10 percent by weight of alcohol in the defendant's blood, such fact shall give rise to the presumption that the defendant's ability to operate a vehicle was impaired by the consumption of alcohol, and such fact may also be considered with other competent evidence in determining whether or not the defendant was under the influence of alcohol.

(c) If there was at such time 0.10 percent or more by weight of alcohol in the defendant's blood, it shall be presumed that the defendant was under the influence of alcohol.

(d) The limitations of this subsection (2) shall not be construed as limiting the introduction, reception, or consideration of any other competent evidence bearing upon the question of whether or not the defendant was under the influence of intoxicating liquor or whether or not his ability to operate a vehicle was impaired by the consumption of alcohol.

(3) (a) Any person who drives any motor vehicle upon a public highway in this state shall be deemed to have given his consent to a chemical test of his breath, blood, or urine for the purpose of determining the alcoholic content of his blood, if arrested for any misdemeanor offense arising out of acts alleged to have been committed while the person was driving a motor vehicle while under

the influence of, or impaired by alcohol. If such person requests that the said chemical test be a blood test, then the test shall be of his blood; but, if such person requests that a specimen of his blood not be drawn, then a specimen of his breath or urine shall be obtained and tested, the election to be made by the arresting officer.

(b) The test shall be administered at the direction of the arresting officer having reasonable grounds to believe the person to have been driving a motor vehicle while under the influence of, or impaired by, alcohol and in accordance with rules and regulations prescribed by the state board of health, with utmost respect for the constitutional rights, dignity of person, and health of the person being tested. No person except a physician, a registered nurse, or a person whose normal duties include withdrawing blood samples under the supervision of a physician or registered nurse shall be entitled to withdraw blood for the purpose of determining the alcoholic content therein. At the time of making such request, the officer, orally and by written notice (which written notice shall be in both English and Spanish and signed by said officer), shall inform the person arrested of his rights under the law and the probable consequences of a refusal to submit to such a test. Such notice shall also state the circumstances on which he relies as reasonable grounds for believing the arrested person was under the influence of alcohol. No civil liability shall attach to any person authorized to obtain blood as provided in this subsection (3) as a result of the act of obtaining blood from any person submitting thereto if the blood was obtained according to the rules and regulations prescribed by the state board of health; except that such provision shall not relieve any such per-

son from liability for negligence in the obtaining of any blood sample.

(c) If any person who has been so arrested refuses to submit to a chemical test when requested by the arresting officer, as provided in this subsection (3), the test shall not be given.

(d) Any person who is dead, unconscious, or otherwise in a condition rendering him incapable of refusal shall be deemed not to have withdrawn the consent provided by paragraph (a) of this subsection (3), and the test may be administered subject to paragraph (b) of this subsection (3). Any person who is dead, in addition to the tests prescribed, shall also have his blood checked for carbon monoxide content and for the presence of drugs, as prescribed by the department of health. Such information obtained will be made a part of the accident report.

(e) The department, upon the receipt of a sworn report of the law enforcement officer that he had reasonable grounds to believe the arrested person had been driving a motor vehicle while under the influence of, or impaired by, alcohol and that the person had refused to submit to the test upon the request of the law enforcement officer, shall, as soon as possible, serve notice upon said person, in the manner provided in section 42-2-117, to appear before the department and show cause why his license to operate a motor vehicle or, if said person is a nonresident, his privilege to operate a motor vehicle within this state should not be revoked. The hearing held in accordance with the order to show cause shall not be continued unless the arrested person, or his representative, can establish to the hearing officer that there has been a recent death

in the arrested person's immediate family, that the arrested person or a member of his immediate family has recently been hospitalized, or that his attorney or a witness is unable to appear, or that a similar good cause exists which prevents the arrested person from appearing at a hearing. When such good cause is established, such hearing shall be held at the earliest possible date. Nothing in this paragraph (e) shall be construed to prohibit the department from rescheduling such hearing if good cause exists which prevents the hearing from being held at the time scheduled. At such hearing, it shall first be determined whether the officer had reasonable grounds to believe that the said person was driving a motor vehicle while under the influence of, or impaired by, alcohol. If reasonable grounds are not established by a preponderance of the evidence, the hearing shall terminate, and no further action shall be taken. If reasonable grounds are established and said person is unable to submit evidence that his physical condition was such that, according to competent medical advice, such test would have been inadvisable or that the administration of the test would not have been in conformity with the rules and regulations of the state board of health or in conformity with the provisions of this section or if said person fails to attend the hearing without good cause shown, the department shall forthwith revoke said person's license to operate a motor vehicle or, if said person is a nonresident, his privilege to operate a motor vehicle within this state for a period of three months for the first such revocation and for a period of twelve months for the second and each subsequent revocation or denial within any five-year period; or, if the person is a resident without such license, the department shall deny to such person the issuance of a license for a period of

three months for the first such revocation or denial and for a period of twelve months for the second and each subsequent revocation or denial within any five-year period. All such periods of revocation or denial shall commence on the date of hearing. The revocation action provided for in this subsection (3) shall be in addition to any and all other suspensions, revocations, cancellations, or denials which may be provided by law, and any revocation taken under this subsection (3) shall not preclude other actions which the department is required to take in the administration of the provisions of this title. The hearings held by the department under this subsection (3) shall be at the district office of the department nearest the jurisdiction wherein the person was arrested.

(f) If the revocation is sustained after such a hearing, the person whose license has been revoked under the provisions of this section shall have the right to file a petition for judicial review in the appropriate court in accordance with section 42-2-127.

(g) Upon request of any person submitting to a chemical test pursuant to this subsection (3), or his attorney, the result of such test shall be made available to him forthwith.

(h) For the purpose of a criminal prosecution for a violation of subsection (1) of this section, the refusal of a person to submit to a chemical test shall not be admissible.

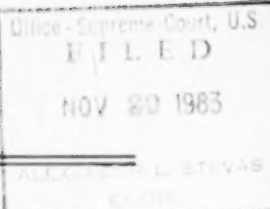
(4)(a) Every person who is convicted of a violation of subsection (1)(a) or (1)(c) of this section commits a class I traffic offense. Upon a conviction of a second or subsequent offense which occurred within five years of

the date of a previous offense, the offender shall be punished by imprisonment in the county jail for not less than ninety days nor more than one year and, in the discretion of the court, by a fine of not less than one hundred dollars nor more than one thousand dollars. The minimum period of imprisonment as provided upon a second or subsequent conviction for a violation of subsection (1)(a) or (1)(c) of this section shall be mandatory, and the court shall have no discretion to grant probation or to suspend the sentence therefor.

(b) Every person who is convicted of a violation of subsection (1) (b) of this section commits a class 2 traffic offense.

(Source and Annotations deleted in printing.)

No. 83-305



In The
Supreme Court of the United States
October Term, 1983

THE PEOPLE OF THE STATE OF CALIFORNIA,

Petitioner,

vs.

ALBERT WALTER TROMBETTA, et al.,

Respondents.

**ON A PETITION FOR A WRIT OF CERTIORARI
TO THE CALIFORNIA COURT OF APPEALS
FIRST APPELLATE DISTRICT**

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Does the due process mandate of the 14th Amendment to the Constitution of the United States, which imposes a duty on law enforcement to preserve evidence collected as a condition to admissibility, require preservation of a breath sample in a driving under the influence of alcohol case, where law enforcement has the capability of preservation of a sample for independent analysis; where the Omicron Intoxilyzer is non-specific for alcohol; where a preservation method is approved by the State; where other preserving methods are available; where the methods of preservation are simple, physically and financially feasible, and where the test results on the preserved sample are scientifically true and will verify the accuracy or establish the inaccuracy of law enforcement testing?
2. Is there a violation of the equal protection mandate of the 14th Amendment to the Constitution of the United States, where state law does not require the preservation of a breath sample for possible retesting by a defendant who has been accused of driving under the influence of alcohol, but does require preservation of blood and urine samples for a defendant's retesting in such a situation?
3. Is there a violation of the equal protection and/or due process mandates of the 14th Amendment to the Constitution of the United States, where a person suspected of driving under the influence of alcohol, chooses a breath test from the three available choices

but is not advised by law enforcement that no retestable sample will be preserved for his later retesting so as to allow said person to exercise an informed consent to either waive the failure to preserve or to have a blood or urine test in which situation preservation is required?¹

PARTIES TO PROCEEDINGS

Joining in the Brief in Opposition are numerous parties, all first consolidated for decision before the California Court of Appeals, First Appellate District, Division Four.

DeMeo & DeMeo and Associates by John F. DeMeo, Esq. for Respondent Albert Walter Trombetta.

Thomas R. Kenney, Esq. for Respondents Michael Gene Cox, Thomas Nelson Muldoon, Clinton James Brown, Densel Lee Furner, Patricia Jane Keeffe, Herbert John Berryessa, and James K. Schneider.

J. Frederick Haley, Esq., Mary A. Allen, Esq., and Matthew Haley, Esq. for Respondent Gregory Moller Ward.

John A. Pettis, Esq. for Respondent Gale Bernell Berry.

¹Although raised by Respondents below, the *Trombetta* Court did not find it necessary to resolve the second and third questions presented. If this Petition is granted, Respondents respectfully request the opportunity to again present these issues.

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In The
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THE PEOPLE OF THE STATE OF CALIFORNIA,
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**ON A PETITION FOR A WRIT OF CERTIORARI
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RESPONDENTS' BRIEF IN OPPOSITION

Respondents, for the reasons set forth herein, respectfully request this Honorable Court deny the Petition for Writ of Certiorari to the California Court of Appeals, First Appellate District.

CONSTITUTIONAL PROVISION INVOLVED

This case involves both the due process and equal protection clauses of the Fourteenth Amendment to the United States Constitution, wherein it is stated:

"No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the

United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of laws."

STATEMENT OF THE CASE

Procedural Background

Prior to their consolidation by the Fourth Division of the First Appellate District of the California Court of Appeals, these cases followed diverse procedural roadways.

In the *Ward* and *Berry* cases judgments of conviction for driving under the influence of alcohol were entered in the Municipal Court. The Contra Costa County Appellate Department of the Superior Court affirmed those convictions, but this three judge panel unanimously certified the questions now before this honorable Court to the Third Division of the First Appellate District of the California Court of Appeals. That Division summarily denied transfer. Respondents Ward and Berry then petitioned the California Supreme Court for Writs of Habeas Corpus. That Court, following extensive briefing, ordered the People in Ward and Berry to show cause before the Fourth Division of the First Appellate District of the California Court of Appeals why relief should not be granted as prayed for by Ward and Berry.

In the *Trombetta* and *Cox* cases, the Municipal Court denied denied defendants' motion to suppress evidence of the intoxilyzer breath tests. The motions were based on

law enforcement's failure to save a sample. Each defendant then appealed to the Appellate Department of the Superior Court of Sonoma County, which affirmed the lower court order and certified the cases for transfer to the Fourth Division of the First Appellate District of the California Court of Appeals. That Court accepted the transfer. On December 30, 1982 all four cases were consolidated.

The Fourth Division of the First Appellate District of the California Court of Appeals (hereinafter, *Trombetta* Court), first rendered its decision on March 28, 1983. Following extensive briefing on a motion to reconsider, the *Trombetta* Court filed a modified opinion which did not change the judgment on April 27, 1983. A Petition for Hearing in the California Supreme Court was denied on June 23, 1983.

The instant Petition for a Writ of Certiorari from the April 27, 1983 decision of the *Trombetta* Court was then brought in this court.

Factual Background

Each Respondent was arrested for driving under the influence of alcohol. [Formerly, California Vehicle Code Sections 23101(a) or 23102(a); now sections 23153(a) or 23152(a), respectively.]

Each was asked to select one of three blood alcohol level tests; blood, breath or urine, pursuant to procedures outlined in California Vehicle Code § 13353(a). Because it is easiest to administer, the police officer urged the Respondents to take the breath test. Each Respondent then submitted to a breath test on the Omicron Intoxilyzer.

Had Respondent selected the blood or urine test, the California Administrative Code required the remaining portion of the sample be saved for defendant's later re-testing (Title 17, California Administrative Code, § 1219.1 and § 1219.2). No similar provision is made for breath sample retention.

Consistent with their custom and practice at that time, the police officers made no attempt to and did not retain a sample of the breath. It was "conceded that no effort was made to capture breath specimens for later testing by the defense." *People v. Trombetta* (1983) 142 Cal. App. 3d 138, 143, 190 Cal. Rptr. 319, — P. 2d —.

The Respondents were not informed nor did they know that if they selected the breath test as opposed to the blood or urine test, a sample would not be retained for them.

At the time of these arrests there was available to law enforcement state approved equipment making retention and preservation of the breath sample collected simple, feasible, inexpensive, accurate and useful.

For example, the People and Albert Walter Trombetta stipulated to the following at the municipal court level in Sonoma County:

1. At no time prior to or after the intoxilyzer test was administered to respondent did any law enforcement or peace officer advise respondent verbally or in writing that there would be no sample of his breath preserved for retesting or for any other purpose.
2. At the time and place of the collection of the breath sample on the intoxilyzer there was and is and had been available to the County of Sonoma

a device approved by the Department of Health of the State of California for the collection of a breath sample for later testing.

3. In this case there was no sample collected for the purpose of later analysis.
4. The approved device which collects and captures breath samples (intoximeter field crimper-indium tube encapsulation kit) for later testing is financially feasible for the state to use and is simple to operate.
5. The approved device which collects and captures breath samples for later testing can be used at any place or location, such as at a police station or in the field.
6. The ruling of the lower court herein subject to all proper appellate review would be binding on the petitioner people and the respondent Albert Trombetta at the trial.

While Respondents below introduced evidence of several methods of preservation, including the Silica Gel Cylinders, the *Trombetta* Court focused on one, the Intoximeter Field Crimper-Indium Tube Encapsulation Kit (hereinafter referred to as the Kit).

"This 'kit' can be used in the field to collect a breath sample which is separate from the sample collected by the intoxilyzer. The device is independent from the breath testing devices and is in effect only a breath collection as opposed to a breath testing device. The subject blows into an indium tube which captures the breath sample. The indium tube is a soft metal device used to capture and preserve a breath specimen for later analysis. The tube originally is in a single piece but when the sample is blown into the tube, it can be crimped to hold the breath sample in three separate compartments. These containers can then be placed in a gas chromatograph (intoximeter) device

which will test the sample for blood alcohol content. The gas chromatograph is an approved device for blood alcohol determination; the indium tube is approved for use with the gas chromatograph if the sample is tested within 14 days of collection. (Instruments Approved for Breath Alcohol Analysis, Dept. of Health, Dec. 20, 1979.).” *People v. Trombetta* supra, 142 Cal. 3d at 142, 143.

The accuracy of the Omicron Intoxilyzer as a test of alcohol content is subject to error because it is non-specific. Because it also registers substances other than alcohol as alcohol, such as butane, it is capable of registering false positives. The gas chromatograph machine mentioned in *Trombetta* is specific for alcohol. It will not measure any other chemical substance as alcohol. For this reason, the gas chromatograph is superior to the Omicron Intoxilyzer.

In Contra Costa and Sonoma Counties, when breath testing was done for the county by an independent laboratory, breath samples were routinely retained via the kit for a defendant who could then request a sample for independent retesting following his arrest. The retest would be done on the gas chromatograph device mentioned above. When those counties began doing their own testing, they consciously abandoned the saving and preservation of a breath sample but continued retention of blood and urine samples.

Following their arrests, all respondents requested from law enforcement a sample of their breath. None was available and their requests were denied.

REASONS FOR DENYING THE WRIT

Rule 17 of the United States Supreme Court Rules sets forth the considerations of this court governing review on certiorari. Respondents contend that none of these considerations are encountered in the Petition for a Writ of Certiorari herein.

The Trombetta decision did not decide a federal question in significant conflict with decisions of other state courts of last resort. [United States Supreme Court Rule 17.1(a)].

The Trombetta Court did not decide a federal question in a way in conflict with applicable decisions of this court. Rather, the decision is an application of principles of due process first set out in *Brady v. Maryland* (1963) 373 U. S. 83, 83 S. Ct. 1194.

The Decision Of The Trombetta Court Does Not Significantly Conflict With Decisions Of Other States On This Federal Question.

The alleged conflict between the state court decisions in the area of breath sample retention is more illusory than real. In all the cases where the court deciding the issue had an adequate record of the feasibility of retaining breath samples for later independent retesting by the defendant and the usefulness of retesting to the defendant, the courts have held that, in order to meet law enforcements' duty to preserve collected evidence under the federal due process clause, those devices which preserve a sample must be used. The decision of a state court with an adequate record before it was:

"Although the state and municipality argued that a suitable system for the preservation of samples of

defendants breath could not be accomplished at reasonable cost with sufficient accuracy, we conclude that the defendants in these cases have shown that the technology does exist to set a reasonable system for preserving breath samples." *Municipality of Anchorage v. Serrano* (Ak. 1982) 649 P. 2d 256, 259.

The Alaska court held retention of a sample was required.

Cases from courts of last resort of other states making similar findings regarding the ease with which the sample could be saved and the usefulness to the defendant of retaining such a sample are Arizona in the case of *Baca v. Smith* (Ariz. 1980) 604 P. 2d 617 and Colorado in *Garcia v. Dist. Court*, 21st Jud. Dist. (Colo. 1979) 589 P. 2d 924. From these findings, each of these courts held there was a due process duty to retain a sample.

Petitioner cites several decisions in support of his contention that there are other state court decisions of last resort which conflict with *Trombetta*. Review of those decisions shows that all but two do not conflict with *Trombetta*, and in those two, the conflict is not significant.

Four of the cases cited by Petitioner hold that no sample need be kept. In each decision, however, the court points out that the record before it was insufficient to make a determination on the feasibility and usefulness of using breath retention equipment. In the Florida decision of *State v. Lee* (Fla. App. 1982) 422 So. 2d 76 the court explained at page 78:

"Lee, who was a moving party [seeking suppression] had the burden of making a showing on the record that there are scientifically developed means by which a breath sample can be preserved for later testing.

He failed to do so when he offered no evidence at the hearing." (brackets added)

And at footnote 5 of that decision, the court added:

"Of course, nothing we have said should be construed to indicate how we would rule upon the issue argued before us should we be presented with a case with evidence and the fully developed record ripe for decision."

And in the case of *Montoya v. Metropolitan Court* (N.M. 1982) 651 P. 2d 1260, 1261, the court held no duty to retain a sample but explained:

"That there is no substantial evidence in the record from which the trial court could find that an independent breath alcohol sample could be accurately retested after capture and preservation on the machines currently in use. Thus, there is no due process requirement that an independent breath sample be preserved as evidence in appellees' cases."

The case of *People v. Reed* (1981) 92 Ill. App. 3d 1115, 48 Ill. Dec. 421, 416 N. E. 2d 694 discussed the duty to preserve the ampoule used with a Breathalyzer. The court explained:

"The same issue was raised in *People v. Godbout* (1976), 42 Ill. App. 3d 1001, 1 Ill. Dec. 583, 356 N. E. 2d 865. That court concluded it could not determine if due process had been violated without evidence in the record regarding the feasibility of preserved (sic) the ampoules and the potential for obtaining exculpatory evidence from preserved ampoules. Similarly, since no such evidence was offered at trial in this case, we cannot determine if this particular defendant was denied due process or if procedures in Illinois are generally violative of due process in cases of this type." Id. at 696, 697.

Also conflicting with *Trombetta*, Petitioner argues, is *State v. Newton* (S.C. 1980) 262 S.E. 2d 906 involving preservation of a Breathalyzer ampoule and simulator. Again, that court explained:

"[A]ppellant has not attempted to show that the ampoules, if available, could be subjected to scientific retesting which would yield reliable results." Id. at 909.

These four decisions do not conflict with *Trombetta*. The *Trombetta* court had before it the record these courts tell us they did not have. If these courts did have the extensive record the *Trombetta* court had, Respondents are confident they would have come to the same holding as *Trombetta*.

Petitioner next cites as conflicting with *Trombetta*, the case of *State v. Cornelius* (N.H. 1982) 452 A. 2d 464. That case discussed the States failure, while administering a Breathalyzer test, to take an additional breath sample for defendants later independent testing. This case, except in an insignificant sense, holds exactly as did *Trombetta*.

In the majority opinion Justice Brock and Justice Bois refused to overrule that courts 1976 decision of *State v. Shutt* (1976) 116 N.H. 495, 363 A. 2d 464. The earlier decision had rejected the argument that a breath sample need be kept. The majority decision does not mention any particular breath retention or testing device but qualifies its opinion when it states:

"The evidence before us indicates that since *Shutt* was decided, advances in technology have occurred, making it possible for the State, at reasonable expense, to take and preserve an additional breath sample or its

functional equivalent for the defendant's later use, and for information of some value to be obtained from 'used' ampoules. We are not prepared, however, to conclude that a statute and the procedures employed in its implementation, which passed constitutional muster in 1976, have because of these technological advances become constitutionally infirm in 1982. It is sufficient to emphasize that as technological advances occur, the use of which by law enforcement authorities will better enable the State to make more meaningful and real the rights guaranteed citizens under our constitutions, the dictates of basic fairness may require that the State avail itself of such technology." *Id.* at 465.

The majority it seems, needed more information before it would overrule *Shutt*. Three other justices, however, were willing to do so.

Justice Douglas, specially concurring, held that breath samples for defendants independent testing should be retained. He did feel that, because of law enforcements good faith reliance on *Shutt*, it should be overruled and samples kept effective February 1, 1982.

Justice Batchelor and Justice King, dissenting, also felt that *Shutt* should be overruled and a breath sample retained, but they felt that it should be effective with this decision.

Thus, *State v. Cornelius*, *supra*, 452 A. 2d 464, in all significant aspects, holds with *Trombetta*. Three of five justices felt that the state had a due process duty, while administering a Breathalyzer test, to take an additional breath sample for the defendant's later independent testing. Although their own opinion recognized the evidence compelling them to overrule *Shutt*, the two remaining jus-

tices were, as described in an ancient maxim, "unwilling to recognize the new moon out of loyalty to the old."

Petitioner has cited two cases which arguably conflict with *Trombetta*. The first is *State v. Larson* (N.D. 1981) 313 N. W. 2d 75 which held that due process did not require the state to preserve a sample of defendant's breath as taken at the time of a Breathalyzer test. The second is *State v. Young* (Kan. 1980) 614 P. 2d 441 where, upon being stopped for driving under the influence of alcohol, the officer had defendant blow into a kit, creating three metal compartments holding defendant's breath. The officer had those samples tested on an Intoximeter Mark IV, a gas chromatograph machine. The *Young* court held there was no duty to retain any of the compartments for defendant's later use. On close examination, the alleged conflict is insignificant.

Both courts held that law enforcement need not retain a breath sample because, by statute in both states, a suspect of driving under the influence of alcohol may request and obtain a chemical test at his own expense by a qualified physician of his choice. Section 39-20-02 NDCC; *State v. Larson*, supra, 313 N. W. 2d at 753, K. S. A. 8-1004; *State v. Young*, supra, 614 P. 2d at 446.² The courts found that this provided the defendant with all the due process to which he was entitled.

²A second question in this case was the duty to preserve the Breathalyzer ampoule. The court found that there was insufficient evidence on the issue of how later testing of that ampoule could benefit the defendant. *People v. Larson*, supra 313 N. W. 2d at 754. Also, the utility and feasibility of preserving this ampoule differs greatly from that of retaining a breath sample, the issue in *Trombetta*. See *State v. Young*, supra 614 P. 2d at 445, 446. The *Larson* courts holding on this second question cannot conflict with *Trombetta*.

This precise argument was made and rejected in *Trombetta* based on California Vehicle Code Section 13354 (b) allowing defendant to have an independent test at his own expense by his own expert. That section further provides that "the failure or inability to obtain an additional test by a person shall not preclude the admissibility in evidence of the test taken at the direction of the peace officer." The *Trombetta* court apparently found that, as a practical matter, California Vehicle Code Section 13354 (b) is a useless due process protection for the defendants because the sample so obtained would be taken much later than the one the peace officer obtained.

The problem is clearly stated in the California case of *In re Martin* (1962) 58 Cal. 2d 509, 512, 24 Cal. Rptr. 833, where the court explained:

"It is a matter of common knowledge that the intoxicating effect of alcohol diminishes with the passage of time; hence, the probative value of a blood test diminishes as well. In a short period of time an intoxicated person may 'sober up' sufficiently to negate the materiality of a blood test where the sample has not been timely withdrawn. (Citation)"

The same reasoning is true with a breath sample. A defendant would probably be arrested at night or during the weekend. If he decided to have an independent test he would have to wait until such time as the law enforcement officers would allow him to do what was necessary to obtain one. He would then have to find an expert. He would then have to either arrange to meet that expert at the jail or wait until his release to go and meet the expert. It would take hours before this could all be arranged and the test actually administered. Furthermore, all this assumes that the defendant would have at

that moment the financial resources to retain these expensive experts. If the defense experts sought to testify at trial, the People would challenge the probative value and admissibility of that test on the ground that the defense sample was taken much later than the sample which the police officer took.

Whatever due process these independent testing provisions afford suspects in Kansas and North Dakota, they are useless in California, as the *Trombetta* court realized. California Vehicle Code § 13354(b) is as likely to give birth to due process as a cow is to give birth to a colt.

Concluding then, there is no significant interstate conflict on the issues raised in *Trombetta*, and there is no need for the United States Supreme Court to grant this petition on that consideration. (United States Supreme Court Rule 17.1(a))

The Trombetta Decision Is An Application Of Principles Of Due Process First Set Out By This Court In Brady v. Maryland (1963) 373 U.S. 83, 83 S. Ct. 1194.

Petitioner erroneously argues that this petition need be granted because the *Trombetta* decision resolved a Federal question of law in a manner which conflicts with applicable decisions of the United States Supreme Court, mentioning particularly the case of *Brady v. Maryland* (1963) 373 U. S. 83, 83 S. Ct. 1194. United States Supreme Court Rules, Rule 17.1(c). Rather than conflicting with *Brady* as petitioner suggests, the *Trombetta* decision judiciously applies *Brady* to the *Trombetta* facts.

In the *Brady* decision, this court explained:

"We now hold that the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or punishment, irrespective of the good faith or bad faith of the prosecution.

The principle of *Mooney v. Holohan* is not punishment of society for misdeeds of a prosecutor but avoidance of an unfair trial to the accused. Society wins not only when the guilty are convicted but when criminal trials are fair. . . ." *Id.* at 87.

Petitioner is not seriously contending that *Brady* was not followed in *Trombetta*. Rather, petitioner is once again disputing factual matters resolved by the *Trombetta* court, particularly regarding the feasibility of retaining a breath sample and the utility of that sample to a defendant on retesting. The United States Supreme Court does not grant certiorari to review evidence and discuss specific facts. *United States v. Johnson* (1924) 268 U.S. 220, 227. As is discussed below, that is what petitioner seeks in all areas he contends *Trombetta* is inconsistent with *Brady*.

Petitioner first argues that if the Omicron Intoxilyzer is the breath testing device used, the breath is never possessed. Because decisions of this court, including *Brady*, do not require law enforcement to preserve anything it does not possess, petitioner contends there is no due process violation by law enforcement in not retaining a sample. Petitioner cites *People v. Miller* (1975) 52 C.A. 3d 666, 125 Cal. Rptr. 341 and *State v. Young* (Kan. 1980) 614 P.2d 441.

The case of *State v. Young*, *supra*, 614 P.2d 441 recognized that the prosecution *did* possess a breath sample. The breath was possessed in each of the three compart-

ments created by operation of the kit. The language quoted by the Kansas case recognizes, as we do here, that because no attempt whatsoever was made to retain the sample "possessed," it did not exist when defendant requested it. This does not assist petitioner.

People v. Miller, supra, 52 Cal. App. 3d 666 is the case that *Trombetta* all but overruled almost exclusively on this factual issue concerning collection and possession.

"The *Miller* court determined that 'Hitch [*People v. Hitch* (1974) 12 Cal. 3d 641] merely holds that evidence which the prosecution once possessed must be held. The test by intoxilyzer . . . may have gathered evidence in the sense of placing the breath in the chamber but it was not evidence of which the government could 'take possession.' The only element reducible to possession was the printout card which has been preserved. (citation)

We disagree fundamentally with the *Miller* characterization of what happens when a breath sample is taken. That is, in our view, such a taking is a collection of evidence within the Hitch rationale. The question then is whether the specimen may be exhausted in testing without taking available steps to obtain and preserve another specimen for retesting." (brackets added) *People v. Trombetta*, supra, 142 Cal. App. 3d at 143, 144.

On the possession issue, the *Miller* court is inaccurate. As with blood and/or urine testing, California has extensive statutory and administrative procedures for the testing of breath for alcohol content. As with blood and/or urine, law enforcement officers take a specimen, and, by the use of some testing device, determine the alcohol content contained therein. Though a breath sample may be difficult to see or touch, it is specious to suggest it is

not "possessed." If the blood or urine sample was thrown away following testing, it is difficult to imagine the Attorney General arguing that it was not possessed. It is by virtue of this faulty reasoning that *Miller* is no longer the law in California. Where law enforcement seeks to determine through testing the blood-alcohol content of the breath of a suspect under arrest for driving under the influence of alcohol, law enforcement possesses breath as much as they can possess urine and blood. How could Petitioner have measured alcohol in breath he didn't possess?

If *Trombetta* held that due process required law enforcement to save and preserve for the defendant evidence they never possessed, respondents agree there would be a significant conflict with existing decisions of this court. No such holding was rendered and therefore there is no conflict.

Secondly, petitioner contends that *Trombetta* requires law enforcement to take affirmative steps to gather evidence for the accused. This holding, petitioner argues, conflicts with *Brady* and thus requires clarification by the United States Supreme Court.

Trombetta does not so hold. It merely holds that, as part of law enforcement's federal due process duties to preserve evidence they have gathered and intend to use against the defendant (here, the breath of the defendant), they must retain a breath sample. *Trombetta* does not require law enforcement to gather evidence, but only to preserve that which it has collected, possessed, tested and intends to use against the defendant. In petitioner's argument, he again relies on *People v. Miller*, supra, 52 C. A.

3d 666 and *State v. Young*, supra, 614 P. 2d 441. As argued above, these cases are not controlling.

Thirdly, petitioner argues that California Vehicle Code § 13354 (b), which allows a suspect arrested for driving under the influence of alcohol to obtain an expert of his choice at his own expense, provides that suspect with all due process to which he is entitled. As previously discussed in respondents' brief in opposition, the *Trombetta* court found that section does not provide such a suspect with due process.

Next, petitioner urges that the duty to preserve under *Brady* does not arise because in *Trombetta* it was not proven that a practical means of preservation exists which permits a reliable retest. (Petition, page 23) Unbelievably, petitioner states: "The California Court of Appeal refused to address the issue." (Petition, page 24) There may well never be another court which had as much information on that issue as the *Trombetta* court. In addition to the record from the four trial courts, because respondents Ward and Berry were before the *Trombetta* court on Habeas Corpus, additional evidence on the issue was introduced at the appellate level. This included declarations from the leading experts on breath retention devices on the West Coast.

In addition, by letter of May 14, 1982, to all counsel from the clerk of the *Trombetta* court, the court vacated the submission and asked counsel to provide letter briefs on two issues. The first issue was: "Is it feasible to require breath samples to be preserved when an Intoxilyzer is used?" The second question was: "Would later testing of such a sample yield useful results?" After all par-

ties and amicus responded, the matter was resubmitted and the decision rendered.

On an extensive record, the *Trombetta* court found that it is feasible to preserve breath samples and that upon retesting, the results thereof are useful. The court found that there are available steps to collect and preserve a breath specimen for retesting. The court agreed with the reasoning of the Colorado Supreme Court in *Garcia v. District Court*, supra, 589 P. 2d 924 and the finding by that court that the breath could have been preserved and that the failure of the state to collect and preserve evidence, when those acts can be accomplished as a mere incident to a procedure routinely performed by state agents, amounts to suppression of that evidence.

Petitioner insists that the Advisory Committee on Alcohol Determination, California Department of Health, concluded at a meeting that no device currently exists which would permit a reliable retest of a breath sample. (Petition, page 26)

The *Trombetta* court had before it and relied on overwhelming contrary evidence on the reliability of breath sample retesting. Furthermore, this "recommendation" was first presented to the *Trombetta* court by two unsolicited letters from Deputy Attorney General Charles R. B. Kirk. It may be significant to note that counsel for respondent Trombetta had to inform the *Trombetta* court that Mr. Kirk was wearing two hats. At the time the recommendation was made and the *Trombetta* court informed of it by Mr. Kirk, he was also a member of the committee that authored the recommendation.

Furthermore, it was not the recommendation of the Advisory Committee itself, but of an Ad Hoc Committee

to the Advisory Committee. Finally, the Department of Health did not and has not adopted the recommendation and the kit continues to be a state-approved device.

Again, petitioner is requesting that the United States Supreme Court review a factual dispute which, based on an extensive record, the *Trombetta* court decided against him. The request should be denied.

Oddly, the case petitioner relies on most heavily in the petition, *State v. Young* (Kan. 1980) 614 P. 2d 441, effectively lays to rest any contention that the kit does not provide a sample which could yield reliable results on retest. The device in that case which law enforcement used was the kit.³ If the kit provides reliable results to law enforcement in Kansas, it can do the same for a defendant in California.

Concluding, *Brady* required that, to comply with federal due process, evidence favorable to an accused may not be suppressed, irrespective of the motives for so doing if the evidence is material to either guilt or punishment. *Brady v. Maryland, supra*, 373 U.S. at 87. Cases following *Brady* have held that this duty holds whether the evidence is clearly exculpatory or simply may have been. In J. Skelly Wright's decision of *United States v. Bryant* (D. C. Cir. 1971) 439 F. 2d 642, he explained:

"Were *Brady* and its progeny applicable only when the exact content of the non-disclosed materials was known, the disclosure duty would be an empty promise, easily circumvented by suppression of evi-

³The *Trombetta* court focused on the kit. There was also evidence before it of other devices also capable of preserving a breath sample useful to defendant on retest. None of these devices have yet been approved by the State.

dence by means of destruction rather than mere failure to reveal. The purpose of the duty is not simply to correct an imbalance of advantage, whereby the prosecution may surprise the defense at trial with new evidence; rather, it is also to make of the trial a search for truth informed by all relevant material, much of which, because of imbalance in investigative resources, will be exclusively in the hands of the Government." *Id.* at 648

The *Trombetta* court, following exhaustive briefing, oral argument and taking of evidence, found that law enforcement could easily retain and preserve a sample of the breath it had taken from the accused. Further, they found this evidence would, on retesting, yield reliable results which would verify the accuracy or establish the inaccuracy of the test law enforcement had performed on the breath. Following principles of due process enunciated by the United States Supreme Court in *Brady v. Maryland*, supra, 373 U. S. 83, the *Trombetta* court held law enforcement must preserve a sample as a condition to the admissibility of their test results. On this petition, petitioner requests that the United States Supreme Court review the factual determinations made by the *Trombetta* court. The United States Supreme Court need not resolve an essentially factual matter and the respondents respectfully request the petition be denied.

Emergency Legislation, Effective September 15, 1983, Has Largely Remedied The Due Process Violations Presented To This Court.

Following the *Trombetta* decision emergency legislation was passed and California Vehicle Code § 13353.5 was amended to read, in pertinent part:

"13353.5 (a) In addition to the requirements of Section 13353, a person who chooses to submit to a

breath test shall be advised before or after the test that the breath-testing equipment does not retain any sample of the breath and that no breath sample will be available after the test which could be analyzed later by the person or any other person.

(b) The person shall also be advised that, because no breath sample is retained, the person will be given an opportunity to provide a blood or urine sample that will be retained at no cost to the person so that there will be something retained that may be subsequently analyzed for the alcoholic content of the person's blood. If the person completes a breath test and wishes to provide a blood or urine sample to be retained, the sample shall be collected and retained in the same manner as if the person had chosen a blood or urine test initially.

(c) The person shall also be advised that the blood or urine sample may be tested by either party in any criminal prosecution. The failure of either party to perform this test shall place no duty upon the opposing party to perform the test nor affect the admissibility of any other evidence of the alcoholic content of the blood of the person arrested."

Although not relevant to these proceedings, this legislation provides a modicum of due process to a suspect who elects to take the breath test which Albert W. Trombetta, et al. did not have. While this legislation may not go far enough, it is a step in the right direction and may vitiate the need, if any, for the United States Supreme Court to grant this petition.

CONCLUSION

Respondent respectfully requests this court to deny the Petition for a Writ of Certiorari.

Dated: November 26, 1983.

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FILED

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ALEXANDER L. STEVENS

CLERK

IN THE SUPREME COURT

OF THE

UNITED STATES

OCTOBER TERM, 1983

THE PEOPLE OF THE STATE OF CALIFORNIA,

Petitioner,

v.

ALBERT WALTER TROMBETTA, ET AL.,

Respondents.

REPLY TO RESPONDENTS' BRIEF
OPPOSING CERTIORARI

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I

THE REPLY CONTAINS SEVERAL
FACTUAL INACCURACIES

In the first two paragraphs of page
6 of their brief, respondents claim that
the "facts" establish that the Omicron

Intoxilyzer is inaccurate, the gas chromatograph a superior instrument, and adverts to instrument utilization in several California counties. There were no factual findings as to any of these "facts."

The Intoxilyzer has been approved as an accurate device for evidential breath testing in California. (See People v. Miller (1975) 52 Cal.App.3d 666, 670, 125 Cal.Rptr. 341, 343.) The alleged greater specificity of the gas chromatograph has been judicially rejected as a basis for discounting the accuracy of the Intoxilyzer. (See Intoximeters, Inc. v. Younger (1975) 53 Cal.App.3d 262, 269-270, 125 Cal.Rptr. 864, 869-870.) Currently the Intoxilyzer represents 82% of the breath instruments being used in California, as contrasted with the 14% which are gas chromatographs.

II

THERE IS NO DEVICE APPROVED IN CALIFORNIA FOR REFEREE ANALYSIS.

In their statement of facts (pp. 4-6), respondents make much of the "indium tube," a remote sample capturing device limited to use with the gas chromatograph intoximeter. This is a red herring.

Use of the indium tube is limited to subsequent analysis with the Intoximeter brand gas chromatograph, for which it is an accessory. (See Department of Health Services, List of Approved Instruments and Related Accessories Approved for Breath Alcohol Analysis (December 20, 1979) pp. 6-7, 12.) It is not approved for use with any other testing device, including a competing brand of gas chromatograph. (Id., at pp. 1-5, 8-11.)

The indium tube was never designed or approved as an instrument for referee

analysis. "Referee analysis" is analysis of a sample collected and retained for the purpose of permitting a third-party referee to validate the accuracy of the initial breath-alcohol test. Referee analysis seems to be the retention envisioned by the California Court of Appeal in Trombetta.

The indium tube was designed and approved solely for the limited purpose of remote collection for subsequent analysis, and arose out of the problem posed by the necessity of collecting a sample in a rural area far removed from breath-alcohol testing devices. It is use in but a single California county. Due to the inherent limitations of such a sample, it is simply not suitable for referee analysis, although courts (and defense counsel) frequently confuse the two separate items.

The limited nature of the device's approval was discussed in the California

Department of Health "Ad Hoc Committee." The danger of confusing apples with oranges prompted the full California breath-alcohol Advisory Committee to recommend no further use of the device. Rather than attempt to paraphrase or quote the discussion of the issue, we are printing appropriate passage from the Advisory Committee report (Appendix A) and from the "Ad Hoc" report (Appendix B).^{1/}

1. Defense counsel finds sinister purpose in the inclusion of the People's attorney here (Mr. Kirk) among the members of the Ad Hoc Committee on Breath Testing, Advisory Committee on Alcohol Determination (Response, p. 19). However hats that public employee may wear, he is not and never has been a member of the Advisory Committee itself, whose varied membership is established by statute (Calif. Health & Saf. Code, § 436.50), which itself adopted these portions of the Ad Hoc Committee report, and which includes among its members, for example, Mr. Richard Erwin, a public defender and author of Defense of Drunk Driving Cases, now in its third edition.

The indium tube is a red herring. It was approved for a limited purpose, limited to one brand of instrument, and has almost no use in California. It is not a device which will permit the prosecution to retain a breath sample analyzed for evidential purpose for later retesting by the defendant. As the Municipal Court held below, that simply cannot be done. This Court should not lose sight of the real issue: whether a due process preservation requirement forbids use of a breath testing machine which automatically expels and thus destroys the breath sample during the test process.

III

THERE IS ALREADY A STATUTORY AVENUE
AVAILABLE FOR DEFENSE SAMPLE COLLECTION.

Respondents dispute the adequacy of California's express statutory requirement that a defendant be given an opportunity to collect his own test sample on the ground that this right is illusory since

many hours may go by before the sample can be collected (Response, pp. 13-14). Respondents ignore the judicial gloss which assures constitutional lustre.

If officers improperly prevent the defendant from obtaining his own sample in a timely manner, then evidence of any alcohol test taken by or for the police will be suppressed. (Brown v. Municipal Court (1978) 86 Cal.App.3d 357, 363-365, 150 Cal.Rptr. 216, 220-222.) Since alcohol is quickly excreted from the body, the same principle requiring a prompt test or sample collection for law enforcement purposes applies to a sample or test for defense purposes. (Id., 86 Cal.App.3d at 362, 150 Cal.Rptr. at 220.) Once testing for law enforcement is completed, if the defendant has requested his own test by his own expert, he must at least be given an opportunity to make arrangements for it,

such as a phone call. (In re Martin (1962) 58 Cal.2d 509, 511-512, 24 Cal.Rptr. 833, 834; In re Koehne (1960) 54 Cal.2d 757, 760, 8 Cal.Rptr. 435, 435; McCormick v. Municipal Court (1961) 195 Cal.App.2d 819, 821-824, 16 Cal.Rptr. 211, 215.) If facilities for sample collection are readily available locally, then officers must take the defendant to them once he has made those arrangements. (See In re Howard (1962) 208 Cal.App.2d 709, 711, 716, 25 Cal.Rptr. 590, 591, 594.) If the defendant is already someplace like a hospital where he can have his own sample taken, then the officer cannot interfere with his request to have his own sample. (Brown v. Municipal Court, supra, 86 Cal.App.3d at 360, 362, 365, 150 Cal.Rptr. at 219, 220, 222.)

Officers cannot hamper or interfere with the defendant's reasonable efforts to

timely obtain his own sample. (In re Martin, supra, 58 Cal.2d at 512, 24 Cal.Rptr. at 835.)

IV

EMERGENCY LEGISLATION HAS NOT
"SOLVED" THE PROBLEM.

Adverting to the new California Vehicle Code section 13353.5, respondents seem to suggest that the Trombetta problem has been "solved." (Response, pp. 21-22.) That is not correct. There has been absolutely no judicial construction of the statute, which was suggested only in a concurring opinion in Trombetta.^{2/} Whether the California courts will find the legislative remedy adequate to the constitutional purpose

2. In our Petition, we noted that the Court of Appeal stayed the remittitur of its Trombetta decision until August 30, 1983. This stay has now been made indefinite pending resolution of this petition.

is unknown. But if there is no constitutional duty to preserve a breath sample for the defense or with an instrument which automatically expels a sample only temporarily collected, then the issue will never arise.

CONCLUSION

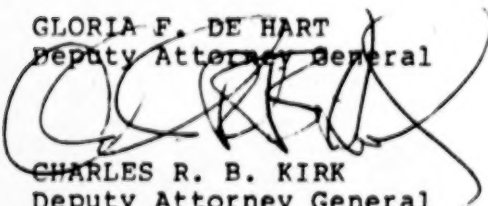
Petitioner respectfully requests this Court to grant certiorari to review this significant federal issue and provide a clear exposition of the standard which should guide the various state courts.

DATED: January 4, 1984

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APPENDIX A

Excerpt from Advisory Committee
on
Alcohol Determination,
Notes of Meeting,
December 14, 1982
(pages 12-15, 16-17)

The Advisory Committee next discussed the second item on its agenda: the remote collection of breath samples for later analysis. The Ad Hoc Committee's "Notes of Meeting: August 31, 1982" constituted the basis of the Advisory Committee's discussions of this agenda item. The recommendations of the Ad Hoc Committee to the Advisory Committee are shown as follows:

1. A deletion from the regulations of the provisions for remote collection of breath alcohol samples for later analysis;

2. The retention, in a "grandfather clause", of the ability of San Bernardino County to continue its presently approved use of the field crimper-indium tube system in its geographically remote stations;

3. An affirmative declaration in the regulations that there is no

scientific need or reason to retain breath samples for referee analysis;

4. A recognition that the retention of a breath sample for referee analysis, in addition to being scientifically unnecessary, can produce confusion inasmuch as the two tests, the immediate analysis and the referee analysis, are not equivalent; and

5. The need to develop new regulations specific for retention of breath samples for referee analysis if it should happen that the courts should rule that breath samples must be retained, even though the scientific need for reason for this does not exist.

The Ad Hoc Committee had also concluded that there is presently no reliable and practical way to retain a breath sample for referee analysis

inasmuch as there is no sample capturing device which can meet performance standards with respect to: air blank, calibration with a standard solution, and quality control with a reference sample.

Details concerning these recommendations are contained in the Ad Hoc Committee's "Notes of Meeting" August 31, 1982" (see Attachment, Pages 23 through 36).

The Advisory committee's discussion of the Ad Hoc Committee's recommendations first established that adoption of recommendation Number 1 will not affect an arrested person's continuing to have a choice of a blood, breath or urine test. Furthermore, deletion of remote collection of breath samples for later analysis will have no practical significance on the availability of breath tests themselves since only one

county makes any use of remote collection. Information presented at this meeting showed that even in that county (San Bernardino), the use of remote collection is minimal and would easily be replaced in that county with an instrument at the single remote site which remains. Therefore, recommendation Number 2 is not needed.

The Advisory Committee adopted recommendation Number 1. In doing this, the Advisory Committee made it clear that it was not disapproving the ability of the field crimper-indium tube system to function for the purpose of remote collection (the purpose for which it was evaluated and approved in California), but was taking the position that remote collection systems are not needed in California. Therefore, no reason exists to maintain the provisions for remote collection in the regulations, and no

reason exists for thereby continuing the State's responsibility for review and approval of remote collection systems. As long as the provisions for remote collection remain in the regulations, the State is obligated to review and test as many systems for remote collection as manufacturers devise. Also, as long as the provisions for remote collection remain in the regulations, there remains the opportunity for confusing remote collection with a totally different application, such as referee analysis. The Advisory Committee was emphatic in its conclusion that, for the reasons stated in the Ad Hoc Committee's report, remote collection is not a scientifically valid check of a breath testing instrument. Remote collection is simply another method for doing breath testing but it has its own inherent problems, which can only add

error to any attempt to use remote collection to check a breath testing instrument.

Therefore, the Advisory Committee adopted the recommendation that the provisions for remote collection of breath-alcohol samples for later analysis be deleted from the regulations. This action is consistent with other actions underway in all state agencies to rework regulations in order to remove provisions which have become obsolete and unnecessary.

The Advisory Committee discussed the effect of this action if there should be a court decision favoring the retention of breath samples for referee analysis. The Advisory Committee reaffirmed its conclusion that, in such a case, the provisions presently in Title 17 regulations relating to remote collection would be inadequate for referee analysis. There

would have to be action which is consistent with recommendation Number 5. New regulations setting performance standards for referee analysis would have to be established. Even then, it is questionable whether the regulations can govern referee analysis performed by or for the defense. Sections 436.51 and 436.52 of the statute in the Health and Safety Code restrict the regulations to "testing by or for law enforcement agencies"

The Advisory Committee reviewed in detail the statement in the report of the AD Hoc Committee that there is no scientific need or reason to retain breath samples for referee analysis. The basis for this conclusion is presented in detail in the Ad Hoc Committee's "Notes of Meeting: August 31, 1982" wherein the scientific characteristics of blood (and urine)

analysis, "immediate analysis" of breath samples, and "later analysis" of remotely collected breath samples were compared and contrasted. The "Notes" also presented the manner in which the regulations complement the scientific characteristics. The Advisory Committee affirmed and accepted the conclusion reached by the Ad Hoc Committee that the procedures for "immediate analysis" of breath samples required by the California regulations leave no room for undetected error because of the scientific confidence derived from these procedures. In making this statement, the Advisory Committee recognized that instruments are indeed subject to failure, but that the consequence of the procedures required by California is that any such instrumental error will be discovered. Therefore, there exists no reasonable cause to

postulate that an erroneous instrument will be detected.

Even if a satisfactory device for capturing and analyzing a referee breath sample were developed, there would still be no scientific reason to use it in California, especially when all the additional costs are considered. For reasons stated in the "Notes of Meeting: August 31, 1982", a discrepancy between the test result of an immediate analysis and the test result of referee analysis on a captured sample could have nothing to do with the accuracy of the instrument used for the immediate analysis, and there is no way to go back to verify the accuracy of the referee analysis. On the other hand, the accuracy of the instrument used for immediate analysis can be verified at any time by the procedures used in California. If there is reason to believe that an instrument

is faulty, the accuracy records for that instrument is faulty, the accuracy records for that instrument can be obtained, the instrument itself can be checked again with Simulator solutions and with correlation tests, and records can be examined to determine what actions an agency took if a periodic determination of accuracy indicated instrument error.

APPENDIX B

Ad Hoc Committee on Breath Testing,
Advisory Committee on Alcohol
Determination, Department of Health
Services, Notes of Meeting, August 31,
1982 (pages 26-27, 29-36)

1.

The Ad Hoc Committee reviewed the history and the reasons behind the amendments in 1975 which resulted in the introduction to the regulations of the foregoing provisions relating to remote capture of breath alcohol samples for later analysis. The scenario that was originally presented to the Department and to the Advisory Committee on Alcohol Determination which led to the addition of remote sample capture to the regulations envisioned, as an example, some location in the State which was some fifty miles from a breath testing instrument. An officer making an arrest for drunk driving in this setting would be faced with the problem of having to drive the arrested person fifty miles to a location where a breath testing instrument was installed in order to perform a usual "immediate analysis", creating additional problems such as

beat coverage, custodial care in transport, and diminution of blood-alcohol level. This type of scenario led to the proposal that there was a need to have another type of breath alcohol analysis; namely, the remote capture of breath alcohol samples for later analysis. The two test systems in which law enforcement was interested were the field crimper-indium tube system (manufacturer: Intoximeters, Inc.) and the SM-7 silica gel tube system (manufacturer: Luckey Laboratories, Inc.). Remote sample collection and later analyses can be illustrated with the field crimper-indium tube system. With this system, an officer would have the ability to collect a person's breath sample at the site of arrest. The officer would remove the field crimper from the trunk of his vehicle and plug it into the

cigarette lighter to bring the field crimper from the trunk of his vehicle and plug it into the cigarette lighter to bring the field crimper up to its operating temperature of 50 degrees Centigrade (122 degrees Fahrenheit). This temperature was selected by the manufacturer in order to encompass the range of temperatures which could exist in a vehicle's trunk, including the summer months. Next, the officer would position the indium tube in the crimper and have the person provide the breath sample. When the officer judged that the person provided the alveolar breath sample, the officer's squeezing of the handle of the field crimper would divide the indium tube into three individually sealed capsules, each containing a portion of the person's expired breath sample. The officer would then place the indium tube, which now contained the

encapsulated, remotely collected breath samples, into its box and mail it to a forensic alcohol laboratory for later analysis. The 14-day stability requirement was established relative to this use. This was considered sufficient time for the remotely collected breath sample to have been mailed to a forensic alcohol laboratory, to have been received at the laboratory and to have been tested at the laboratory.

Additionally, the Advisory Committee on Alcohol Determination concluded that the later analysis of the remotely collected breath sample was very different from the immediate analysis of a breath sample where the subject expires directly into the instrument which performs the immediate analysis. In the case of samples collected remotely, their later analysis is

subject to many manipulations including separating the breath sample from the capturing system and transporting it into the machine which does the actual analysis. Therefore, the regulations require that later analysis of remotely collected breath samples be subject to the more stringent procedures of Article 6 for forensic alcohol analysis.

The Ad Hoc Committee next considered a series of other issues related to the capture of breath alcohol samples for later analysis. These issues are summarized in the following statements:

1. The concept of remote collection of samples has been confused with the concept of breath sample retention for referee analysis.
2. There is no scientific need to retain a breath sample for referee analysis.

3. There is no reliable and practical way to retain a breath sample for referee analysis inasmuch as there is no breath sample capturing device which can meet the performance standards with regard to: air blank, calibration with a standard solution; quality control with a reference sample.
4. If regulations relative to retention of breath samples for referee analysis are needed for any reason, then new regulations should be written specifically for this application, including such performance standards as the number of replicates, storage, stability, etc.

As was covered in the foregoing

deliberations of the Ad Hoc Committee, remote collection of breath alcohol samples for later analysis was placed into the regulations to answer a specific problem which was postulated at one time; namely, the practical problem which could result from an officer's making an arrest at a location which was remote from an installed breath testing instrument. All the conditions set forth in the regulations for remote collection and later analysis were developed for this specific application and not for another application, such as referee analysis. Referee analysis is analysis by the defendant of remaining sample, when sufficient sample remains [Section 1219.1(g), Section 1219.1(g)(2), Section 1219.2(c), and Section 1210.2(c)(1)].

The concept of a need for referee analysis of breath samples was discussed from the point of view of the defense.

Aside from meeting the needs of law enforcement, the purpose of the statute and the regulations is to obtain justice. This is accomplished by securing accuracy which is verifiable. A retained sample for breath would match the retained samples for blood and urine. Actions occurring currently in some California courts have resulted in suppression of breath testing results in drunk driving cases because of judgments that a breath sample should have been retained for referee analysis. These cases are expected to receive review in California's appellate courts. Mr. Erwin reported that the concept of breath sample retention for referee analysis has been supported by court decisions in Alaska, Colorado and Arizona and that Dr. Kurt Dubowski of the University of Oklahoma testified in its favor.

Detailed discussion of the proposition that there is no scientific need to retain a breath sample for referee analysis brought out the following points. This proposition is reflected in the regulations. The regulations recognize a difference between blood and urine testing, on the one hand, and breath testing (i.e., "immediate analysis"), on the other hand. There are two different requirements with regard to the technical ability of the persons who perform the tests. There is a scientific basis for this. When a blood test is performed, there is much manipulation: a person has to take a sample from a blood tube, has to measure it, has to carry it to the testing system, has to do a series of steps on the sample, has to perform a calculation, and has to record the result. At each one of these steps, with all of this

manipulation, there is a possibility of human error. Therefore, there can exist here a rationale for retesting the blood sample because the referee can then determine whether in all of this manipulation some error was made. Similar considerations are applicable to urine tests. However, breath testing is different, and this difference is recognized in the regulations. The statute, too, recognizes differences by setting distinct authorizations for forensic alcohol analysis of blood and urine (Section 436.51) and breath alcohol analysis (Section 436.52). What makes breath testing different from blood or urine testing is the following. First, the instrument on which the immediate analysis is performed is one which has been evaluated and found to meet the required performance standards. From the periodic determinations of

accuracy there is current evidence with regard to the accuracy of that individual instrument. There is no human manipulation associated with the test: the subject's mouth is on the instrument, the subject breathes directly into the instrument, the instrument collects the appropriate breath sample, the instrument does the analysis without any manipulation by the operator (this is the reason for technically untrained officers being permitted to perform breath tests [Section 1221.1(b)(1)]), the result is calculated by the instrument and the test result is recorded in printed form by the instrument. Adding to this the fact that California requires the analysis of two separate breath samples which cannot differ from each other by more than 0.02 grams percent, there is no scientific need to retain a breath sample because there is no room for undetected error.

A defense concern was expressed over the possibility that test records can be switched to make a person appear to have elevated test results. However, this concern can be resolved by some corrective regulation such as serially numbering test records. Also, there was recognition that, if the arrested person wants a referee analysis, Section 13353(f) of the Vehicle Code already makes provision for this by permitting the person to have an additional test of the person's own choosing. A person's choice of a separate blood test for referee analysis would be a better verification of the accuracy of the breath test than trying to retain a breath sample. In a discussion related to this topic, it was noted that the concept of "referee" analysis implicitly assumes a qualified referee. Although law enforcement agencies must perform

alcohol analysis in forensic laboratories licensed for this purpose by the Department of Health Services (Section 436.51), no similar requirement is imposed upon defense of "referee" analysis, and it is doubtful that the Department has any authority to regulate "referee" analysis. This limitation would make it difficult for the Department to establish scientifically suitable criteria for collection and retention of "referee" breath samples.

Referring back to its foregoing discussion on remote collection of breath alcohol samples for later analysis, the Ad Hoc committee made a series of connected recommendations to the Advisory Committee on Alcohol Determination:

- (1) a deletion of the provisions for remote collection of breath alcohol samples for later analysis;

- (2) the retention, in a "grand-father clause", of the ability of San Bernardino County to continue its presently approved use of the field crimper-indium tube system in its geographically remote stations;
- (3) an affirmative declaration in the regulations that there is no scientific need or reason to retain breath samples for referee analysis;
- (4) a recognition that the retention of a breath sample for referee analysis, in addition to being scientifically unnecessary, can produce confusion inasmuch as the two tests, the immediate analysis and the referee analysis, are not equivalent (after the immediate analysis

- of a breath sample, an attempt is made to transfer it from the instrument by some form of manipulation into a device for retention; the remaining sample is then tested in a completely separate instrument which has its own variability; and, unlike a loss of blood or urine sample where spilling or loss is verifiable, loss of an air sample is not verifiable); and
- (5) the need to develop new regulations specific for retention of breath samples for referee analysis if it should happen that, even though the scientific need for this does not exist, the courts should rule that breath samples must be retained.

The Ad Hoc Committee also recognized

that there is presently no reliable and practical way to retain a breath sample for referee analysis inasmuch as there is no sample capturing device which can meet the performance standards with respect to: air blank, calibration with a standard solution, and quality control with a reference sample. In the immediate analysis of a breath sample, the validity of the particular instrument used to test a person can be established. An air blank run on that instrument just prior to the time the person is tested establishes that the instrument is free of alcohol or other volatile substance which would cause an inaccurate test. That instrument is calibrated and its accuracy is determined by running through it the vapors from standard solutions of alcohol. All of this is done on the same instrument on which the person is

tested. However, this is not possible with any of the systems which are proposed for sample for referee analysis. Taking the silica gel tube as an example, it is impossible to run an air blank just prior to a person's test on the same silica gel tube with which the person is tested in order to determine whether it is free of alcohol or other contaminants. Also, unlike an instrument for immediate analysis, it is impossible to calibrate or determine the accuracy of the same silica gel tube with which the person is tested. The court will not know whether the silica gel in that tube was packed properly, whether the silica gel granules were the correct size, or whether there is "channeling" in the gel which would falsely reduce the test result. The accuracy of the silica gel tube on which a person is tested cannot be subjected to periodic determinations of accuracy, as

is done with an instrument for immediate analysis in order to discover any deterioration of performance ability.

If the Advisory Committee on Alcohol Determination were to decide that, scientific necessity aside, there exists a need to retain breath samples for later analysis, then there would have to be a consideration given to the development of regulations which would take these facts into account. For example, there would have to be a performance standard relative to the type of random testing given a manufacturing lot of silica gel tubes (or other breath sample capturing device) in order to establish the reliability of each individual silica gel tube. In light of the foregoing discussion, a discrepancy between the test result of an immediate analysis and a test result of referee analysis on a

captured sample could have nothing to do in fact with the accuracy of the immediate analysis and could instead represent a defect in the captured sample of its analysis. In this case, there would be no way to go back to verify the accuracy of that silica gel tube.

While there was consensus in the Ad Hoc Committee concerning the recommendations listed in the foregoing and the reasons for these recommendations, there continued to be expressed a concern that these actions not adversely affect the practice in San Bernardino County where the field crimper-indium tube system is used for remote collection of breath samples in the manner originally intended; that is, at stations some 200 miles away from a site at which a breath testing instrument is installed. There was also concern that a "grandfather" provision allowing

San Bernardino County to continue its present practice, would appear contradictory to the Ad Hoc Committee's recommendation that capture devices are unreliable. This resulted in a restatement by the Ad Hoc Committee that such an apparent conflict is the result of mixing the concept of remote capture with the concept of referee analysis. The present regulations contain performance standards, including a stability standard, which are specific for the one application; that is, remote capture of breath alcohol samples for later analysis. All the applicable standards of performance and procedure in the present regulations are those which the Advisory Committee on Alcohol Determination judged to be adequate in 1975 when remote collection was the intended use. A continued use of the field crimper-indium tube system for

this purpose by San Bernardino County would remain consistent with the regulations and adequate for purposes of traffic law enforcement.

However, the issue here is a use of such capturing systems, not for remote collection but for referee analysis. In the latter application, the purpose of referee analysis is to compare its test result to the test result obtained with a breath testing instrument. If the two disagree, doubt will be ascribed to the immediate analysis. And yet, the disagreement could be the fact that the capture was contaminated with alcohol, or that it leaked, or that it failed to collect an adequate sample, or that storage conditions caused to deteriorate. And, whereas the instrument for immediate analysis has records to support its accuracy and the instrument for immediate analysis can be subpoenaed for checking,

no like evidence can be gained from the capture device. An important consideration is the scientifically reasonable expectation that the probable direction of error in capturing systems is that the test results of referee analysis will be lower than the test results of immediate analysis, because of the types of errors and losses that can occur when trying to retain a breath sample or when trying to test a captured sample.

CERTIFICATE OF SERVICE BY MAIL

CHARLES R. B. KIRK, a member of the Bar of the United States Supreme Court, hereby certifies that on January 4, 1984, a copy of the annexed Reply to Respondents' Brief Opposing Certiorari was served by mail upon the counsel of record for each of the parties respondent by depositing a copy in the United States Mail at the United States Post Office in

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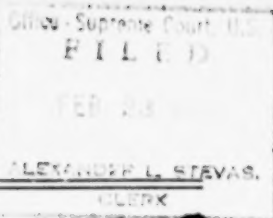
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CHARLES R. B. KIRK

No. 83-305



In The
Supreme Court of the United States
October Term, 1983

THE PEOPLE OF THE STATE OF CALIFORNIA,
Petitioner,
v.

ALBERT WALTER TROMBETTA, et al.,
Respondents.

ON WRIT OF CERTIORARI TO THE
CALIFORNIA COURT OF APPEAL,
FIRST APPELLATE DISTRICT

BRIEF FOR PETITIONER

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QUESTIONS PRESENTED

- (1) Does a duty to preserve evidence under federal due process forbid the use in a drunk driving case of a breath testing machine which automatically expels and thus destroys the breath sample during the test process?
- (2) Does a duty to preserve evidence under federal due process compel law enforcement to gather evidence for use of the defendant?

PARTIES TO PROCEEDING

The California Court of Appeal consolidated four separate cases in this proceeding, all of which involved drunk-driving prosecutions. In addition to respondent Trombetta (No. A016358), the decision affects Michael Gene Cox (No. A016374), Gregory Moller Ward (No. A017265), and Gale Bernell Berry (No. A017266). The Cox case (No. A016374) was itself a consolidated case which involved, in addition to Cox, Thomas Nelson Muldoon, Clinton James Brown, Densel Lee Furner, Patricia Jane Keeffe, Herbert John Berreyessa, and James K. Schneider.

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In The
Supreme Court of the United States
October Term, 1983

THE PEOPLE OF THE STATE OF CALIFORNIA,
Petitioner,
v.

ALBERT WALTER TROMBETTA, et al.,
Respondents.

**ON WRIT OF CERTIORARI TO THE
CALIFORNIA COURT OF APPEAL,
FIRST APPELLATE DISTRICT**

BRIEF FOR PETITIONER

OPINIONS BELOW

The opinion filed by the Court of Appeal on March 28, 1983, is reported at 141 Cal. App. 3d 400. This opinion was substantially modified on April 27, 1983, and the opinion as modified was ordered republished in its entirety, appearing at 142 Cal. App. 3d 138, 190 Cal. Rptr. 319. Both opinions are contained in the Appendix (J.A., pp. 137, 150).

JURISDICTION

On March 28, 1983, the California Court of Appeal for the First Appellate District filed its opinion dismissing appeals taken by two groups of defendants¹ and granting writs of habeas corpus as to two other groups. The opinion also established a rule binding upon future breath alcohol testing by agencies enforcing California's drunk driving laws. On April 27, 1983, a petition for rehearing was denied, and a substantially modified version of the original opinion was filed. On June 23, 1983, the California Supreme Court denied the People's petition for a hearing.

On July 1, 1983, the Court of Appeal issued an order staying issuance of the remittitur through August 30, 1983, to permit the People to file a petition for certiorari in this Court. The stay was extended indefinitely by an order filed on August 31, 1983.

The jurisdiction of this Court is invoked under Title 28, United States Code, section 1257(3).



CONSTITUTIONAL PROVISION INVOLVED

The case involves interpretation of the due process clause of section 1 of the Fourteenth Amendment to the Constitution, which provides, insofar as pertinent, that:

1. Although these appeals were dismissed on technical grounds, the decision is specifically applicable to the defendants who brought the appeals, none of whom have yet been tried on the drunk driving charges. As to these persons, the decision amounts to an order suppressing evidence. (See 142 Cal.App.3d, at 140, 144, 190 Cal.Rptr., at 320, 323; J.A., pp. 153, 160.)

"No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law"

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STATEMENT OF THE CASE

Procedural Background

All of these cases involve efforts by defendants charged with violation of California's drunk driving laws to suppress the results of breath alcohol tests obtained on an Intoxilyzer machine. Each respondent was arrested and charged with driving while under the influence of alcohol; respondent Ward being charged with two separate offenses.² Before trial, each filed a motion seeking suppression of breath-test results on the ground that the breath sample had not been preserved. All of these motions were denied.

Ward and Berry submitted their cases on the police reports and were convicted. Execution or imposition of sentence was stayed for each pending appeal to the Appellate Department of the Contra Costa County Superior Court, which affirmed their convictions but certified their consolidated cases to the California Court of Appeal.³ When a division of the Court of Appeal declined transfer, each filed a petition for a writ of habeas corpus in the

2. Former California Vehicle Code, § 23102; now § 23152(a).

3. "The superior court on application of a party or on its own motion may certify that the transfer of a case to the Court of Appeal appears necessary to secure uniformity of decision or to settle important questions of law." Cal. R. Ct. 63(a). The Court of Appeal may decline the transfer, however. Cal. R. Ct. 62.

California Supreme Court. That court issued an order to show cause returnable before a different division of the Court of Appeal.

Neither Trombetta nor Cox have yet been tried. The Trombetta motion was denied after an evidentiary hearing, and an appeal was taken to the Appellate Department of the Sonoma County Superior Court. It was stipulated that the hearing in *Trombetta* could be considered in Cox's similar appeal. The denial of their motions was affirmed, but the Appellate Department certified the cases to the Court of Appeal, a division of which accepted transfer. All four cases were thus in the same division and were consolidated.

The Court of Appeal filed its first opinion on March 28, 1983 (*Trombetta I*). A petition for rehearing was denied on April 27, 1983, but in denying the petition the prior opinion was substantially modified (*Trombetta II*).⁴ The California Supreme Court denied a petition for hearing on June 23, 1983.

4. When confronted with the prior authority of *People v. Miller* (1975) 52 Cal. App. 3d 666, 125 Cal. Rptr. 341, in *Trombetta I* the Court of Appeal "distinguished" it on the basis that since that decision "new technology"—specifically the indium tube—had been developed which now permitted breath-sample preservation. *Trombetta I*, 141 Cal. App. 3d at pp. 405-406. Although realizing that silica gel tube retention devices were not approved in California, the court also referred to their use in Colorado and opined that if approved by the California Department of Health, these too might be acceptable. *Id.*, at p. 406. On petition for rehearing, the State pointed out that a silica gel device had been tested in 1971 and again in 1974 and failed all Department of Health tests, while the "new" indium tube had been approved since 1974, more than a year before *Miller* was decided. (Pet. for Reh., pp. 8-9.) In *Trombetta II*, all references to "new technology" were stricken, and the Court of Appeal flatly disagreed with *Miller's* interpretation of what constitutes "possession." *Trombetta II*, 142 Cal. App. 3d 138, 143-144, 190 Cal. Rptr. 319, 322.

Although the Court of Appeal held that an appeal to the Appellate Department of the Superior Court was not available before trial, it nevertheless applied its decision to Trombetta and Cox who have yet to be tried. *Trombetta II*, 142 Cal. App. 3d at 140, 144, 190 Cal. Rptr. at 320, 323. The decision therefore acts as an order suppressing evidence in these two groups of cases.

In the *Ward* and *Berry* cases, the defendants had already been convicted of drunken driving and brought writs of habeas corpus in the Court of Appeal challenging their convictions. The decision orders new trials for these defendants at which trials evidence of the breath-test results will be excluded. *Trombetta II*, 142 Cal. App. 3d at 145, 190 Cal. Rptr. at 323.

Facts

Respondent Berry was arrested for drunk driving on January 16, 1980, near Orinda, California, and given two breath tests on an Intoxilyzer, resulting in two readings of his blood-alcohol concentration (BAC) at a level of .20.⁵ Ward was first arrested for drunk driving on July 6, 1980, near Orinda and given two breath tests on an Intoxilyzer, resulting in BAC readings of .18 and .17. On September 20, 1980, Ward was again arrested for drunk driving in the neighboring town of Moraga and tested on the Intoxilyzer, resulting in BAC readings of .26 and .25. Cox was arrested for drunk driving on December 12,

5. California law requires two breath tests which must agree by +/− .02. 17 Cal. Adm. Code § 1221.4(a) (1); see *People v. French* (1978) 77 Cal. App. 3d 511, 520-521, 143 Cal. Rptr. 782, 786-787.) A level of .10 establishes intoxication. Cal. Veh. Code, § 23155(a) (3); formerly § 23126(a) (3). This level is generally accepted as that level at which all drivers are impaired. See Final Report, Presidential Commission on Drunk Driving (Nov. 1983) p. 17. Actually impairment occurs at a level of .08. *Id.*

1980, in Santa Rosa and tested on the Intoxilyzer, resulting in two BAC readings of .20. Trombetta was arrested for drunk driving on January 31, 1981, in Santa Rosa and tested on the Intoxilyzer, resulting in BAC readings of .19 and .18.

Under California law, a drunk driving suspect is given his choice of submitting to a test of his blood, breath, or urine. Cal. Veh. Code, § 13353(a). The Intoxilyzer is an instrument approved by the California Department of Health for evidential breath testing.⁶ The legal issues turn upon the operation of the instrument itself.

The following explanation of Intoxilyzer operation is found in *People v. Miller* (1975) 52 Cal. App. 3d 666, 668-669, 125 Cal. Rptr. 341, 342:⁷

6. Law enforcement agencies must test breath samples in conformity with Department of Health regulations. Cal. Health & Saf. Code, § 436.51. Breath alcohol analysis may be performed only upon instruments which pass that Department's evaluation tests. 17 Cal. Admin. Code, §§ 1221.1(a), 1221.2, 1221.3(c), 1221.3(d), 1221.3(i).

The Intoxilyzer was first evaluated and approved in California in 1974. See Summary of Activities Relating to Evaluation of Instruments and Related Accessories for Breath Alcohol Analysis, California Department of Health (Report No. 2, Feb. 1974) Table 10, p. 5. "The intoxilyzer has been subjected to rigid scrutiny and testing by a state agency qualified in this technical field. It has been approved for use under the detailed regulations prescribed by that agency." *People v. Miller* (1975) 52 Cal. App. 3d 666, 670, 125 Cal. Rptr. 341, 343. It is still approved and is the instrument of choice by most California law enforcement agencies, constituting 82% of the instruments utilized.

7. *Miller* provides what is the clearest and most succinct of all Intoxilyzer explanations. In the present case, the Court of Appeal did not quarrel with that explanation, and in fact cited it 142 Cal. App. 3d at 141-142, 190 Cal. Rptr. at 321. *Miller*, however, found Intoxilyzer use constitutional and rejected the very argument successfully made here 52 Cal. App. 3d at 669-670, 125 Cal. Rptr. at 342-343. It was this portion of *Miller* with which the Court of Appeal "fundamentally disagreed." 142 Cal. App. 3d at 143-144, 190 Cal. Rptr. at 322.

"The subject's breath is captured in a metal chamber, infrared energy of fixed intensity and wave length is passed through the chamber from one side to a photo-electric cell on the other side. Alcohol absorbs light of the fixed wave length. The device computes the loss of energy, translates the result in terms of the grams of alcohol per 100 milliliters of blood, and prints the result upon a card. In the prescribed operation of the device, clean air is first tested, then the breath of the subject. The chamber is then purged by blowing clear air through it, the clear air is tested, and all three results appear upon the printed card. The two tests of clear air constitute a test of the machine, and should show zero alcohol content. It is apparent that no test result, save the printout card, was available for preservation."

The following facts concerning the operation of the Intoxilyzer were found by the Municipal Court judge in the *Trometta* case:⁸

"It appears to this court that from the testimony elicited and from the evidence submitted, that at best a state when using the 4011-W Intoxilyzer unit, *temporarily* collects or gathers breath of a tested individual. The chamber which collects this breath contains it only for a period of time necessary to conduct an analysis of this breath. By the construction of the machine itself, namely that of having two or [i]ffices, one for introduction and one for the expulsion of the sample, it appears to the court that the temporary control over the breath makes the

8. The only factual findings at the trial level were made in the *Trombetta* case. A copy of Judge Antolini's findings are included in the Appendix (at p. 40). The Cox group of cases came from the same county as *Trombetta* and were governed by that finding. No factual findings were made in *Ward* or *Berry* since the trial court considered itself bound by the decision in *People v. Miller* (1975) 52 Cal. App. 3d 666, 125 Cal. Rptr. 341, which has already been quoted.

ultimate dissipation and destruction of the sample an inherent and obvious consequence of using that particular intoxilyzer unit. The argument that the state is in control of the breath and that by choosing to purge that sample, destroys it, is an argument that in the court's opinion is *reductio ad absurdum*. Mr. Murray, the defense witness, stated in substance, that the intoxilyzer collects breath but not for later analysis and then must be purged in order to be useable again. Without an addition to the present intoxilyzer unit it appears to the court that it would be impossible to exercise permanent control resulting in preservation of any sample. Therefore, it would appear to the court that the destruction of any temporarily collected sample would not be through the actions or efforts of the state, but rather through the workings of the machine itself."

SUMMARY OF ARGUMENT

The Constitution requires neither preservation of nor prosecution with physical evidence. By so interpreting *Brady v. Maryland* (1963) 373 U.S. 83, the California courts have expanded that decision far beyond any reasonable bounds. *Brady* focuses upon the duty to disclose evidence exonerating the accused, not upon a general duty of evidence preservation. Indeed in *United States v. Augenblick* (1969) 393 U.S. 348, 356, this Court held that the loss or destruction of evidence was not a federal constitutional question with overtones of due process. What a defendant is entitled to under due process is a fair trial, and this may be had even though physical evidence has been lost or destroyed.

Whatever preservation requirement may exist under the federal Constitution, it certainly does not arise when

the State does not have evidence in its possession in any useful form. Nor is there any requirement under due process of law that the State should make affirmative efforts to collect evidence for the benefit of the accused.

A violation of *Brady* occurs only if it can be shown that evidence favorable to the defense and material to the case was suppressed. *Moore v. Illinois* (1972) 408 U.S. 783, 794-795. None of the three elements necessary to that showing are demonstrated here. Destruction by the ordinary operation of a testing device is not suppression; this evidence was unfavorable to defendants; and the evidence was not "material" in its due process sense since numerous and adequate avenues remained open to these defendants through which they could test and even challenge the evidence, although it no longer physically existed. Nor was the breath sample destroyed material evidence as a practical matter.

ARGUMENT

I.

The Constitution Requires Neither Preservation Of Nor Prosecution With Physical Evidence.

The opinion below is predicated upon the proposition that the federal Constitution requires the collection and preservation of physical evidence if there is a reasonable possibility that it might be of benefit to the accused. 142 Cal. App. 3d at 143, 190 Cal. Rptr. at 322. This interpretation of the Constitution has its California genesis in *People*

v. *Hitch* (1974) 12 Cal. 3d 641, 527 P.2d 361.⁹ In *Hitch*, 12 Cal. 3d at 645-648, 650-653, 527 P.2d at 364-367, 369, the California Supreme Court devined this rule by reference to *Giglio v. United States* (1971) 405 U.S. 150, 153-154, and *Brady v. Maryland* (1963) 373 U.S. 83, 87, as well as *United States v. Bryant* (D.C. Cir. 1971) 439 F.2d 642, 647-648, which also purports to apply *Brady* in achieving a similar end. Yet *Hitch* and *Bryant* create a quantum leap in the Constitution through transmogrification of *Brady*.

Brady v. Maryland, *supra*, was a murder case in which the prosecutor withheld from the defense a confession in which codefendant Boblit, who was separately tried, had admitted that it was he who had killed the victim. 373 U.S., at 84. This Court viewed nondisclosure of such clearly-exculpatory information as unfair and incompatible with our system of justice. *Id.*, at 87-88. In *Giglio v. United States*, *supra*, 405 U.S., at 154-155, the witness who was virtually the entire prosecution's case falsely testified that he had not been promised immunity, and this Court found that nondisclosure of information heavily bearing upon his credibility created a trial that was fundamentally un-

9. *Hitch* seems to be the fountainhead for those decisions in other states finding a similar duty to preserve evidence. They often cite it, and almost all were decided later. *E.g.*, *Lauderdale v. State* (Alaska 1976) 548 P.2d 376, 381-382 (Breathalyzer ampules); *Baca v. Smith* (Ariz. 1980) 604 P.2d 617, 618-620 (breath samples); *Garcia v. District Court*, 21st Jud. Dist. (Colo. 1979) 589 P.2d 924, 929-930 (breath samples); *People v. Harnes* (Colo. App. 1980) 560 P.2d 470, 472-473 (video tape); *State v. Brown* (Ia. 1983) 337 N.W.2d 507, 509, 511 (blood sample); *State v. Lovato* (N.M.App. 1980) 617 P.2d 169, 171 (blood sample); *State v. Michener* (Or. App. 1976) 550 P.2d 449, 452-454 (Breathalyzer ampule); *City of Seattle v. Fettig* (Wash. 1974) 519 P.2d 1002, 1004-1005 (video tape). Like *Trombetta II*, *State v. Havas* (Nev. 1979) 601 P.2d 1197, 1197-1198, goes even further and requires an affirmative effort to collect possible evidence.

fair. In both cases this Court focused not upon the tangibility or nature of the evidence, but upon its character and the conduct of the prosecution. As this Court observed in *Mooney v. Holohan* (1935) 294 U.S. 103, 112:

“[D]ue process . . . embodies the fundamental conceptions of justice which lie at the base of our civil and political institutions. [Citation.] It is a requirement that cannot be deemed to be satisfied . . . if a State has contrived a conviction through the pretense of a trial which in truth is but used as a means of depriving a defendant of liberty through a deliberate deception of court and jury. . . .”

This Court has also counseled that:

“[T]hough the attorney for the sovereign must prosecute the accused with earnestness and vigor, he must always be faithful to his client’s overriding interest that ‘justice shall be done.’ He is the ‘servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer.’” *United States v. Agurs* (1976) 427 U.S. 97, 110-111.

As this Court noted in *Agurs, id.* at 110, “If the suppression of evidence results in constitutional error, it is because of the character of the evidence, not the character of the prosecutor.” Thus it would seem that the affirmative duty of disclosure which arises under *Brady* exists irrespective of the tangibility of the evidence.

That evidence destruction is not of itself a constitutional violation is apparent from this Court’s decision in *United States v. Augenblick* (1969) 393 U.S. 348, in which a tape recording of an interview with the defendant’s co-participant in indecent sexual acts, as well as notes of that interview, somehow were lost. The Court of Claims had found the loss or destruction of these materials to violate

due process. *Augenblick v. United States* (Ct. Cl. 1967) 377 F.2d 586, 606-607. Though this Court viewed at least the tape destruction a problem under the Jencks Act (18 U.S.C., § 3500), *id.*, at 354, it was not considered an issue of constitutional dimension. Speaking for a unanimous court, Justice Douglas observed (at 356):

"But questions of that character do not rise to a constitutional level. Indeed our *Jencks* decision and the Jencks Act were not cast in constitutional terms. [Citation.] They state rules of evidence governing trials before federal tribunals; and we have never extended their principles to state criminal trials. . . . But certain it is that this case is not a worthy candidate for consideration at the constitutional level.

"The Court of Claims, in a conscientious effort to undo an injustice, elevated to a constitutional level what it deemed to be an infraction of the Jencks Act and made a denial of discovery which 'seriously impeded his right to a fair trial' a violation 'of the Due Process Clause of the Constitution.' 180 Ct. Cl., at 166, 377 F.2d, at 606-607. But apart from trials conducted in violation of express constitutional mandates, a constitutionally unfair trial takes place only where the barriers and safeguards are so relaxed or forgotten, as in *Moore v. Dempsey*, *supra* [(1923) 261 U.S. 86], that the proceeding is more a spectacle [citation] or trial by ordeal [citation] than a disciplined contest."

"There is no rule of law which requires the government to prove its case by 'real evidence.' " *Lebron v. United States* (1st Cir. 1957) 241 F.2d 885, 887, cert. den., 354 U.S. 911; accord, *Ware v. United States* (8th Cir. 1958) 259 F.2d 442, 444; *Brake v. State* (Mo. 1970) 460 S.W.2d 639, 641-642; *People v. Shafer* (1950) 101 Cal. App. 2d 54, 59-60, 224 P.2d 778, 781-782. Indeed, the majority of the evidence in any case is entirely testimonial.

Even in the most heinous of crimes—murder—physical proof of death is not required. *St. Clair v. United States* (1894) 154 U.S. 134, 152.¹⁰ The reports are replete with instances in which the evidence has been mistakenly discarded, negligently lost, routinely destroyed, or consumed in the process of analysis, without being considered offensive to due process.¹¹ Loss or destruction of evi-

10. This rule prevails even in California. *E.g.*, *People v. Manson* (1977) 71 Cal. App. 3d 1, 25, 139 Cal. Rptr. 275, 287, cert. den., 435 U.S. 953; *People v. Scott* (1959) 176 Cal. App. 2d 458, 489-496, 1 Cal. Rptr. 600, 619-623, cert. den., 364 U.S. 471, reh. den., 364 U.S. 944.

11. *United States v. Traylor* (9th Cir. 1981) 656 F.2d 1326, 1334-1335 (cocaine routinely destroyed); *United States v. Haddon* (5th Cir. 1976) 536 F.2d 1027, 1029-1030 (mash sample routinely destroyed); *D'Aquino v. United States* (9th Cir. 1951) 192 F.2d 338, 350, cert. den., 343 U.S. 935, reh. den., 343 U.S. 958 (tapes and Tokyo Rose scripts routinely destroyed); *Lee v. State* (Alaska 1973) 511 P.2d 1076, 1077 (heroin used up); *People v. Shafer* (1950) 101 Cal. App.2d 54, 59, 224 P.2d 778, 781 (heroin capsules crushed); *State v. Herrera* (Fla.App. 1979) 365 So.2d 399, 400-401 (heroin used up); *State v. Lightle* (Kan. 1972) 502 P.2d 834, 836 (drugs used up); *State v. Carlson* (Minn. 1978) 267 N.W.2d 170, 175 (bloodstain used up); *Gedicks v. State* (Wis. 1974) 214 N.W.2d 569, 572-573 (vapors evaporated); but see *Stipp v. State* (Fla. App. 1979) 371 So.2d 712, 713-714; *State v. Gaddis* (Tenn. 1975) 530 S.W.2d 64, 69.

Some courts, considering the issue more one of confrontation, have found no constitutional violation since the witness finding or testing the evidence is available for cross-examination. *E.g.*, *United States v. Sewar* (9th Cir. 1972) 468 F.2d 236, 238, cert. den., 410 U.S. 916 (blood sample discarded); *United States v. Brumley* (10th Cir. 1972) 466 F.2d 911, 916, cert. den., 412 U.S. 929 (paint particles used up); *State v. Cruz* (Ariz. App. 1979) 600 P.2d 1129, 1132 (drugs lost); *State v. Burns* (Conn. 1977) 377 A.2d 1082, 1085-1086 (clothing, hair samples lost); *State v. Armstrong* (Fla. App. 1978) 363 So.2d 38, 39 (loot returned); *People v. Ashton* (Ill. App. 1974) 309 N.E.2d 285, 286 (loot, weapon routinely destroyed). Others have not focused

(Continued on following page)

dence goes to the weight of the evidence, not its admissibility. *United States v. Pullings* (7th Cir. 1963) 321 F.2d 287, 296; *Ware v. United States* (8th Cir. 1958) 259 F.2d 442, 444; *Gedicks v. State* (Wis. 1974) 214 N.W.2d 569, 572-573; see *St. Clair v. United States* (1894) 154 U.S. 134, 152-153. Ordinarily the loss or destruction of evidence is most "harmful" to the prosecution. See, e.g., *United States v. Loud Hawk* (9th Cir. 1979) 628 F.2d 1139, 1149, cert. den., 445 U.S. 917. It is at least an embarrassment to the prosecution when it has no evidence to exhibit. See, e.g., *Munich v. United States* (9th Cir. 1966) 363 F.2d 859, 861. It assuredly weakens the State's case. The defense may actually profit when a tested substance is missing, since it is able to "question the chemist who performed the test on the correctness and reliability of the procedures that were followed, and to challenge the veracity of the results . . . without being handicapped by the threat of further tests being performed so as to remove all doubt in the eyes of the jury." *United States v. Ortiz* (9th Cir. 1979) 603 F.2d 76, 80. But loss or destruction of evidence simply does not present a federal constitutional question. *United States v. Augenblick*, *supra*, 393 U.S., at 356; *United States v. Loud Hawk*, *supra*, at 1153-1154 (Kennedy, concurring).

(Continued from previous page)

on a particular right, but have declined to hold that the constable or his expert erred. E.g., *United States v. Cochran* (5th Cir. 1983) 697 F.2d 600, 606 (inaudible tape erased); *United States v. Shafer* (7th Cir. 1971) 445 F.2d 579, 581-582 (fuses, powder routinely destroyed); *Munich v. United States* (9th Cir. 1966) 363 F.2d 859, 860, cert. den., 386 U.S. 974 (heroin routinely destroyed); *People v. Vick* (1970) 11 Cal. App. 3d 1058, 1066, 90 Cal. Rptr. 236, 241-242 (body buried); *Partain v. State* (Ga. 1978) 232 S.E.2d 46, 46-47 (cocaine used up); *State v. Sprout* (Mo. 1963) 365 S.W.2d 572, 575-576 (bloodstains lost).

Of even less constitutional concern, then, is evidence which the State never possessed in a form permitting practical retention. It is one thing to claim accountability for evidence taken into State custody and to forbid throwing it away, but it is an astounding proposition to extend responsibility to even those items the State never had. *People v. Miller, supra*, 52 Cal. App. 3d, at 669-670, 125 Cal. Rptr., at 343; *People v. Young* (Kan. 1980) 614 P.2d 441, 446. As noted in *Miller, supra*, "The test by intoxilyzer . . . may have 'gathered' evidence in the sense of placing the breath in the chamber, but it was not evidence of which the government could 'take possession.'" As this Court has declared, "The law does not require impossibilities." *Pointer v. United States* (1894) 151 U.S. 396, 413.

Yet *Trombetta II* goes even beyond that fringe in requiring the State to take affirmative steps to gather evidence for the accused. As noted in *Miller*, 52 Cal. App. 3d, at 670, 125 Cal. Rptr., at 343, with an Intoxilyzer "The only element reducible to possession was the printout card, which has been preserved." In finding the facts below, Judge Antolini observed that "Without an addition to the present intoxilyzer unit . . . it would be impossible to exercise permanent control resulting in preservation of any sample." Requiring the State to develop some system for retaining a breath sample represents affirmative conduct for the sole benefit of the accused; a duty never before imposed upon the State. As the Kansas Supreme Court remarked in *State v. Young* (Kan. 1980) 614 P.2d 441, 446, in rejecting that proposition and cases advancing it:

"The basis for this requirement in this case is not well defined. These courts seem to be aware that

other courts do not require an extra sample. They hold in a general way, however, that it is incumbent upon the state to employ regular procedures to preserve evidence for the defendants. They require a state agent, in the regular performance of his duties, to reasonably foresee what evidence 'might be favorable to the accused' and to obtain and preserve the same for the defendant's use. [Citations.] The difficulty of accepting this logic in the present case is apparent. The item in question here is merely a sample of breath from the accused himself, which he alone can furnish for independent testing . . ."

The difficulty in envisioning any limits upon such a duty disturbed the *Miller* court, which cautioned:

"The unwarranted extension . . . [of the duty] could have strange and unsettling results. If all evidence which can be made demonstrative *must* be so transformed, we shall encounter problems with extrajudicial declarations which, with fortuitous foresight, could have been tape-recorded, and eye-witness observations of events which could have been photographed."

The rule espoused by *Trombetta II* is without definable limits.

An even greater step beyond *Brady* was made when the Court of Appeal required the state to "preserve the captured evidence *or its equivalent* for the use of the defendant." 142 Cal. App. 3d at 144 (emphasis added). Of the devices approved in California, only the Intoxilyzer is non-destructive; the others physically consume the sample in the test process. See fn. 14, *infra*, at p. 22. This would mean that a completely different sample than even the police used would have to be taken for the defendant's testing. And in the case of the Intoxilyzer, even the retention devices used in Colorado, to which the *Trombetta*

If court referred, do not preserve the breath; they purport to capture the alcohol portion of the breath with an absorbant. In other words, there is no device whatsoever which would permit the defendant to retest—however unreliably—the same sample in the same form as that tested by the police.

There is no doubt that preservation of a substance chemically tested—such as a breath sample, were it possible—would be an ideal situation, but nonpreservation does not mean that the defendant has been denied a fair trial. *United States v. Traylor* (9th Cir. 1981) 656 F.2d 1326, 1335. Perfection is not constitutionally mandated. *Michigan v. Tucker* (1974) 417 U.S. 433, 446. As this Court observed in *McGautha v. California* (1971) 402 U.S. 183, 221:

“[T]he Federal Constitution . . . does not guarantee trial procedures that are the best of all possible worlds, or that accord with the most enlightened ideas . . . , or even those that measure up to the individual predilections of members of this Court. [Citation.] The Constitution requires no more than that trials be fairly conducted”

“When criminal evidence is lost or destroyed, the court’s principal concern is whether the defendant can have a fair trial even though he is not able to examine all the relevant evidence.” *United States v. Traylor, supra*, at 1334. Loss must seriously impair the defendant’s ability to present his defense. *United States v. Loud Hawk* (9th Cir. 1979) 628 F.2d 1139, 1153, fn. 3 (Kennedy, concurring). The evidence must be so material that the defendant cannot get a fair trial without it. *United States v. Wilks* (10th Cir. 1980) 629 F.2d 669, 674. Yet as Judge Kennedy noted in *United States v. Loud Hawk, supra*, at 1154: “Rarely

will the unfairness that might be caused by the destruction of evidence rise to the level of making the proceedings 'a spectacle or trial by ordeal.'” Yet that is the standard for finding a due process violation. *United States v. Augenblick* (1969) 393 U.S. 348, 356.

Many courts have held that the ability on cross-examination to probe into the accuracy of test results, the competence of the expert, the acceptability of the methodology, and the adequacy of the equipment are sufficient to satisfy constitutional concerns even though the evidence itself is missing or destroyed.¹² As the California Court of Appeal noted in *People v. Miller, supra*, 52 Cal. App. 3d, at 669, 125 Cal. Rptr., at 343:

“The only element reducible to possession was the [Intoxilyzer] printout card, which has been preserved. The machine itself remains available. It and the frequent testings required by regulations of the Department of Health are available for discovery and impeachment.”

Nothing more is constitutionally required.

Nor is there something *sui generis* about breath testing in drunk driving cases which creates an exception to the rule. As a matter of fact, a defendant charged with drunken driving is uniquely prepared to counter the State's chemical evidence, for it is he who is in possession of the sample source. As the Kansas Supreme Court observed in *State v. Young* (Kan. 1980) 614 P.2d 441, 446:

12. *United States v. Traylor* (9th Cir. 1981) 656 F.2d 1326, 1335; *United States v. Ortiz* (9th Cir. 1979) 603 F.2d 76, 80; *United States v. Sewar* (9th Cir. 1972) 468 F.2d 236, 238; *United States v. Brumley* (10th Cir. 1972) 466 F.2d 911, 916; *State v. Cruz* (Ariz. App. 1979) 600 P.2d 1129, 1132; *People v. Vick* (1970) 11 Cal. App. 3d 1058, 1066, 90 Cal. Rptr. 236, 241-242; *State v. Burns* (Conn. 1977) 377 A.2d 1082, 1085-1086; see *State v. Cloutier* (Me. 1973) 302 A.2d 84, 89.

"The item in question here is merely a sample of breath from the accused himself, which he alone can furnish for independant testing by his own physician as authorized by . . . [statute]." Like Kansas, California law specifically provides that a drunk-driving suspect has an absolute right to have his own sample collected and tested by his own expert. Cal. Veh. Code, § 13354(b). Police officers are forbidden from interfering with that right. See *People v. Superior Court (Scott)* (1980) 112 Cal. App. 3d 602, 605, 169 Cal. Rptr. 412, 413.¹³ Due process does not require more. *State v. Young, supra*; *State v. Cornelius* (N.H. 1982) 452 A.2d 464, 465.

In *Trombetta II*, the California Court of Appeal held that due process was satisfied only if the prosecution used a device which preserved something for retesting for the defendant. See 142 Cal. App. 3d, at 142, 144, 190 Cal. Rptr., at 321-323. This very contention was previously rejected in *People v. Miller, supra*, 52 Cal. App. 3d, at 670, 125 Cal. Rptr., at 343, with this commentary and observation:

13. If officers improperly prevent the defendant from obtaining his own sample in a timely manner, then evidence of the alcohol test taken by or for the police will be suppressed. *Brown v. Municipal Court* (1978) 86 Cal. App. 3d 357, 363-365, 150 Cal. Rptr. 216, 220-222. Since alcohol is quickly excreted from the body, the same principle requiring a prompt test or sample collection for law enforcement purposes applies to a sample or test for defense purposes. *Id.*, 86 Cal. App. 3d, at 362, 150 Cal. Rptr., at 220. Once testing for law enforcement is completed, if the defendant has requested his own test by his own expert, he must at least be given an opportunity to make arrangements for it, such as a phone call. *In re Martin* (1962) 58 Cal. 2d 509, 511-512, 24 Cal. Rptr. 833, 834; *In re Koehne* (1960) 54 Cal. 2d 757, 760, 8 Cal. Rptr. 435-436; *McCormick v. Municipal Court* (1961) 195 Cal. App. 2d 819, 821-824, 16 Cal. Rptr. 211, 215. If facilities for sample collection

(Continued on following page)

"We find it no answer to say . . . that another device . . . could have been used and that, for some undetermined time, it would have preserved a sample chemical subject to reasonably accurate testing. . . .

"The unwarranted extension of *Hitch* could have strange and unsettling results. If all evidence which can be made demonstrative *must* be so transformed, we shall encounter problems with extrajudicial declarations which, with fortuitous foresight could have been tape-recorded, and eyewitness observations of events which could have been photographed."

What the "collection and preservation" requirement really does it to completely reject fundamental concepts which underlie both our governmental agencies and our judicial system. It is otherwise presumed that governmental officials will faithfully perform their duties. *E.g.*, *Kephart v. Richardson* (3d Cir. 1974) 505 F.2d 1085, 1090; Cal. Evid. Code, § 664. The preservation requirement assumes that they will not. California breath test instruments are rigorously tested, periodically checked, and their use strictly regulated. *People v. Miller, supra*. The preserva-

(Continued from previous page)

are readily available locally, then officers must take the defendant to them once he has made those arrangements. See *In re Howard* (1962) 208 Cal. App. 2d 709, 711, 716, 25 Cal. Rptr. 590, 591, 594. If the defendant is already someplace like a hospital where he can have his own sample taken, then the officer cannot interfere with his request to have his own sample. *Brown v. Municipal Court, supra*, 86 Cal. App. 3d, at 360, 362, 365, 150 Cal. Rptr., at 219, 220, 222.

Current California law gives the accused even greater protection. Vehicle Code, section 13353.5, requires any suspect who has elected to take a breath test to be advised that no sample will be retained for possible retesting, so that if he wants a sample for retest, he must give a sample of blood or urine. The section also requires the sample to be collected for him by the testing agency. *Id.* This statute was enacted in response to *Trombetta II*.

tion requirement assumes that the instruments will fail, or the strictures be ignored. Years ago in *St. Clair v. United States* (1894) 154 U.S. 134, 152, this Court relied upon a decision by Justice Story holding that a murder at sea could be proved though the body was never found. In *United States v. Gilbert* (No. 15,204) 25 Fed. Cas. 1287, 1290-1291, Justice Story commented thusly:

"[I]t is probable, that in some few instances, though they have been rare, innocent persons have been convicted, upon circumstantial evidence, of offences, which they never committed. The same thing has probably sometimes, though perhaps not more rarely, occurred, where the proofs have been positive and direct from witnesses, who have deliberately sworn falsely to the facts, constituting the guilt of the accused. But to what just conclusion does this tend? Admitting the truth of such cases, are we, then, to abandon all confidence in circumstantial evidence, and in the testimony of witnesses? Are we to declare, that no human testimony to circumstances or to facts, is worthy of belief, or can furnish a just foundation for a conviction? That would be to subvert the whole foundations of the administration of public justice."

And that is precisely what the preservation requirement does.

II.

There Has Been No Violation Of Any Brady Standard.

No matter what is required in the way of evidence preservation, *Brady* has not been violated here. In *Moore v. Illinois* (1972) 408 U.S. 783, 794-795, this Court explained that:

"The heart of the holding in *Brady* is the prosecution's suppression of evidence in the face of a de-

fense production request, where the evidence is favorable to the accused and is material either to guilt or to punishment. Important, then, are (a) suppression by the prosecution after a request by the defense, (b) the evidence's favorable character for the defense, *and* (c) the materiality of the evidence." (*Italics added.*)

These factors have been conjunctively joined by this Court. Yet not one of them is satisfied here.

The Intoxilyzer automatically pumps the sample analyzed out so that the instrument can be recycled for another test; that is how the manufacturer designed it. Thus the breath sample is "destroyed" in the analytical process.¹⁴ Up until now, it has been held that a test procedure which by its nature destroys the material tested is not the equivalent of suppression. *United States v. Love* (5th Cir. 1973) 482 F.2d 213, 220 (gunshot residue used up); *State v. Atkins* (Fla. App. 1979) 369 So. 2d 389, 390 (heroin used up); see also cases cited in fn. 11, *supra*, at pp. 13-14; but see *Stipp v. State* (Fla. App. 1979) 371 So. 2d 712, 713-714.¹⁵ Nor is it considered "suppression"

14. All breath testing instruments approved in California destroy the sample by one means or another. The Intoxilyzer discharges its sample into room atmosphere. In the Breathalyzer, the sample is chemically consumed as it bubbles through a solution of potassium dichromate and sulphuric acid. In the gas chromatograph devices, the breath is separated into various components and swept out into room atmosphere along with a carrier gas. One model—the one which can analyze an indium-tube sample—also burns the sample tested in the process.

15. Some cases, including *Stipp*, require the prosecution to give notice to the defense before engaging in destructive testing of small samples. *State v. Gaddis* (Tenn. 1975) 530 S.W.2d 64, 69; see *State v. Carlson* (Minn. 1978) 267 N.W.2d 170, 175, fn. 4. California Vehicle Code, § 13353.5, accomplishes much the same thing.

where the destruction flows from a routine practice. *D'Aquino v. United States* (9th Cir. 1951) 192 F.2d 338, 350; see *United States v. Augello* (2nd Cir. 1971) 451 F.2d 1167, 1170. If the defendant "requests" his own sample, California law assures that right. Cal. Veh. Code, § 13354(b); see fn. 13, *supra*, at pp. 19-20. Hence the first of the *Moore* tests is not satisfied.

The second requirement is that the evidence be favorable to the accused. Of course the converse is true here; an evidential breath test with a BAC exceeding .10 is clearly incriminating. *Brady* does not concern itself with incriminating evidence. *United States v. American Radiator & Standard Sanitary Corp.* (3d Cir. 1970) 433 F.2d 174, 202, cert. den., 401 U.S. 948. In this regard, both *People v. Hitch* (1974) 12 Cal. 3d 641, and *United States v. Bryant* (D.C. Cir. 1971) 439 F.2d 642, seem to turn this requirement on its head. *Hitch* requires preservation if it is "reasonably possible" that the item might give favorable evidence on the question of guilt or innocence. *Id.*, 12 Cal. 3d, at 648-649, 527 P.2d, at 366-367. As noted in *Edwards v. Oklahoma* (D. Okla. 1976) 429 F. Supp. 668, 671, rev'd on other grounds, 577 F.2d 1119 (10th Cir. 1978):

"This extension of the *Brady* doctrine is not justified as a matter of constitutional law. *Brady* focused upon the harm to the defendant resulting from non-disclosure. *Hitch* diverts this concern from the reality of prejudice to speculation about contingent benefits to the defendant. Without regard to . . . the specific prejudice to the accused the rule would render constitutionally infirm every conviction in which there are missing items of evidence or evidence which may

have been destroyed or damaged by careless or inept investigators.¹⁶

Edwards is consistent with this Court's remarks in *United States v. Agurs* (1976) 427 U.S. 97, 109-110, that "The mere possibility that an item of undisclosed information might have helped the defense, or might have affected the outcome of the trial, does not establish 'materiality' in the constitutional sense."

Federal courts have never found a *Brady* violation where the evidence destroyed or undisclosed would not tend to exculpate the defendant or had no real evidentiary value. See *Norris v. Slayton* (4th Cir. 1976) 540 F.2d 1241, 1243-1244; *Fields v. Alaska* (9th Cir. 1975) 524 F.2d 259, 260-261; *United States v. Brumley* (10th Cir. 1972) 466 F.2d 911, 916; *Bergenthal v. Cady* (7th Cir. 1972) 466 F.2d 635, 637, cert. den., 409 U.S. 1109; *Riley v. Sigler* (8th Cir. 1971) 437 F.2d 258, 259-260. *Brady* does not require preservation of "any evidence which might conceivably aid the defense in the preparation of its case." *Williams v. Wolf* (8th Cir. 1973) 473 F.2d 1049, 1054; see *Killian v. United States* (1961) 368 U.S. 231, 242. A defendant cannot merely assert that the missing evidence would be favorable; he must demonstrate how, colorably establish his claim, or show that the secondary evidence available is not sufficient for a fair trial. *United States v. Balliviero* (5th Cir. 1983) 708 F.2d 934, 943; *United States v. Griffin* (9th Cir. 1982) 659 F.2d 932, 939; *United States v. Loud Hawk* (9th Cir. 1979) 628 F.2d 1139, 1156 (Kennedy, concurring); *D'Aquino v. United States* (9th Cir. 1951) 192 F.2d 338, 350; *State v. Shaw* (Conn. 1981) 441 A.2d 561, 568. Specu-

16. Such attacks on convictions have indeed become old hat in California. See, e.g., *People v. Harris* (1976) 62 Cal. App. 3d 859, 862-865, 133 Cal. Rptr. 352, 353-355.

lation doesn't count. *United States v. American Radiator & Standard Sanitary Corp.* (3d Cir. 1970) 433 F.2d 174, 202.¹⁷

In *United States v. Bryant* (D.C. Cir. 1971) 439 F.2d 642, 647-648, the court established essentially a presumption of favorability where the evidence itself was lost. But the very same factors which so concerned the court in *Bryant* also concerned the court in *Augenblick v. United States* (Ct. Cl. 1967) 377 F.2d 586, 605-606, which this Court reversed for elevating a statutory infraction to a constitutional right, 393 U.S. 348, 356. Such an assumption reflects a basic distrust of public officers which should not be indulged by the courts. See *United States v. Hoppe* (8th Cir. 1981) 645 F.2d 630, 634, cert. den., 454 U.S. 849; *United States v. Sewar* (9th Cir. 1972) 468 F.2d 236, 238; cf. *United States v. Gilbert* (No. 15,204) 25 Fed. Cas. 1287,

17. The *Hitch* court should have heeded such advice. *Hitch* guessed wrong. The vast majority of courts reject the decision because it is simply wrong on the facts—it is not possible to reliably retest Breathalyzer ampules. See *State v. Phillipe* (Fla. App. 1981) 402 So.2d 33, 34; *People v. Stark* (Mich. App. 1977) 251 N.W.2d 574, 575-577; *State v. Teare* (N.J. Super. 1975) 342 A.2d 556, 668, and *State v. Bryan* (N.J. Super. 1974) 336 A.2d 511, 513; *People v. LePree* (Rochester City Ct. 1980) 430 N.Y.S.2d 778, 781-782; *State v. Larson* (N.D. 1981) 313 N.W.2d 750, 755-756; *State v. Shutt* (N.H. 1976) 363 A.2d 406, 407; *State v. Watson* (Ohio App. 1975) 355 N.E.2d 883, 884-885; *Edwards v. State* (Okla.Crim.App. 1976) 544 P.2d 60, 62-64; *Edwards v. Oklahoma* (D. Okla. 1976) 429 F.Supp. 668, 670-671, rev'd on other grounds, 577 F.2d 1119 (10th Cir. 1978); *State v. Newton* (S.C. 1980) 262 S.E.2d 906, 909; *State v. Helmer* (S.D. 1979) 278 N.W.2d 808, 810-811; *Turpin v. State* (Tex.Crim.App. 1980) 606 S.W.2d 907, 916-917; *State v. Canady* (Wash. 1978) 585 P.2d 1185, 1187-1188. The National Safety Council Committee on Alcohol and Drugs has also specifically rejected *Hitch*. See 22 J. Forensic Science 486 (1977). One judge finally put a defense alchemist to the test, providing empirical evidence that retests were 100% inaccurate and always to the defendant's disadvantage. See *People v. Santiago* (Sup. Ct. N.Y. Co.) 455 N.Y.S.2d 511, 515-517.

1290-1291 (C.C. Mass. 1834). It is even less warranted in a case such as this where the instrument is tested, periodically checked, regulated, and available for re-examination.

The third *Brady* factor is that of materiality. But we believe that "materiality" is to be addressed in due process terms; not as the *Hitch* case (12 Cal. 3d, at 647, 527 P.2d, at 365-366) or *Trombetta II* did (142 Cal. App. 3d, at 143, 190 Cal. Rptr., at 322) merely by looking to see whether it was significant evidence in the case. The real question is whether or not the defendant has been deprived of a fair trial. *United States v. Augenblick* (1969) 393 U.S. 348, 356. As we demonstrated in Argument I, *supra*, a fair trial may be had by means other than examination of physical evidence which has been lost or destroyed.

Furthermore, we do not believe that a retained breath sample would be "material" in any real sense. Were the sample retested and found to confirm the prosecution results, then only the prosecution benefits. Cf. *United States v. Ortiz* (9th Cir. 1979) 603 F.2d 76, 80. But what if there is a discrepancy? It means that either the prosecution's instrument was erroneous or the defense analysis was in error. And how can the conflict be resolved? By going back to the test instrument; by examining its logs and by running test samples on it. Yet as *People v. Miller* noted, all this can be done without a "preserved sample" in the first place. 52 Cal. App. 3d, at 670, 125 Cal. Rptr., at 343.

Nor could a preserved breath sample be "material" under *Brady* unless it were proven that a practical means of preservation exists which permits a reliable retest. As the Florida Court of Appeal noted in *State v. Lee* (Fla. App. 1982) 422 So. 2d 76, 78:

"Although some courts have held that failure by the state to automatically preserve a breath sample is tantamount to suppression of evidence, those holdings have come where the defendant has shown that the preservation was scientifically possible. . . . We have found no case which has considered the defendant's due process contention concerning the state's failure to produce a breath sample without evidence and findings at the trial level that it was scientifically possible for the state to collect and preserve such a sample."

Accord, *People v. Reed* (Ill.App. 1981) 416 N.E.2d 694, 697. The trial court below did not make such a finding. The California Court of Appeal refused to address the issue.

The Court of Appeal placed great reliance on *Garcia v. Dist. Court, 21st Jud. Dist.* (Colo. 1979) 589 P.2d 924 928-929, in which there was evidence that samples could be preserved. But in view of the subsequent field experience with the "Colorado method" outlined in *Montoya v. Metropolitan Court* (N.M. 1982) 651 P.2d 1260, 1261, in which the head of Colorado's Department of Health testified that the retests were erroneous 80-90 percent of the time, it can hardly be contended that a "preserved" breath sample yields material evidence for the accused. Not only are there no breath analysis instruments approved for use in California which themselves capture and preserve a breath sample, but there are no capturing devices approved to attach to them. As a matter of fact, the scientific body which the California Legislature established to advise the Department of Health on matters of this sort (Cal. Health & Saf. Code, § 436.50) has recently concluded that no device currently exists anywhere which would permit a reliable retest of a breath sample. Advisory Committee on Alcohol Determination, Department

of Health, Notes of Meeting of August 31, 1982, p. 29. This unreliability has prompted a number of state courts to reject retention requirements. See *State v. Phillipe* (Fla.App. 1981) 402 S.3d 33, 34; *State v. Larson* (N.D. 1981) 313 N.W.2d 750, 755-756; *id.*; *State v. Newton* (S.C. 1980) 262 S.E.2d 906, 909, fn. 1. Furthermore, a discrepancy between instrument test results and a preserved sample would not in itself exonerate, but would simply force a retest of the machine to determine which result was accurate. Hence a retained sample is of no real value; the instrument can always be retested whether or not a sample is preserved. As we have already noted, *supra*, at p. 24, federal courts have never found a *Brady* violation where the destroyed evidence would not tend to exculpate the defendant or had no real evidentiary value.

CONCLUSION

Trombetta II contorts *Brady* into something never intended by this Court. If left standing, it will not only significantly disrupt the ability of California and other States to enforce their drunk driving laws, but will impact upon every other criminal prosecution, making "the State the guarantor of a perfect investigation and the absolute insurer of all evidence," *Edwards v. Oklahoma* (D. Okla. 1976) 429 F. Supp. 668, 671, as well as an investigator and evidence collector for the defense. Though this may be "the best of all possible worlds" for criminal defendants, it is not one created by our federal concept of due process of law.

We submit that these cases must be reversed.

DATED: February 23, 1983.

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In The
Supreme Court of the United States

October Term, 1983

THE PEOPLE OF THE STATE OF CALIFORNIA,

Petitioner,

vs.

ALBERT WALTER TROMBETTA, et al.,

Respondents.

ON A PETITION FOR WRIT OF CERTIORARI
TO THE CALIFORNIA COURT OF APPEALS
FIRST APPELLATE DISTRICT

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QUESTIONS PRESENTED

The Court of Appeal of the State of California, First Appellate District, has construed the due process clause to require in a driving under the influence criminal case, that where evidence is collected by the State, as it is with the Omicron Intoxilyzer, or any other breath testing device, law enforcement agencies must establish and follow rigorous and systematic procedures to preserve the captured evidence or its equivalent for the use of the defendant. This Court held that the failure to preserve evidence in the face of available steps to do so, required the suppression of the results of the Omicron Intoxilyzer test at trial. The questions presented here are:

1. Does the duty to preserve material evidence under federal due process forbid the use in a driving under the influence case of a breath testing device and the results of the test where there are known approved and available steps to obtain and preserve another breath sample for retesting by the defendant but no steps are taken by the prosecution?
2. Does a duty to preserve material evidence under federal due process, compel law enforcement to do so for subsequent use by the defendant, where they have the capability of doing so as an incident to a procedure routinely performed by law enforcement?

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Respondents.

**ON A PETITION FOR WRIT OF CERTIORARI
TO THE CALIFORNIA COURT OF APPEALS
FIRST APPELLATE DISTRICT**

BRIEF FOR RESPONDENTS

STATEMENT OF THE CASE

Procedural Background

(a) The Trombetta and Cox Cases

Prior to their consolidation by Division Four of the First Appellate District of the California Court of Appeals, on December 30, 1982, these cases followed diverse procedural roadways. In the *Trombetta* and *Cox* cases, the Municipal Court of the County of Sonoma denied Respondents' pre-trial motions to suppress evidence consisting of the results of the Omicron Intoxilyzer breath tests¹.

¹There was a stipulation between the Prosecution and Defendant Trombetta that the motion to suppress would be deemed a trial motion binding on the Prosecution and Trombetta at trial. (J.A. 163-164, 168); Reporter's Transcript (hereinafter R.T.) 4-5, 37. This same stipulation was entered into between the Prosecution and Defendants Cox, et al., as to their respective similar motions and the stipulation encompassed an agreement that the *Trombetta* case would be determinative of the Cox group of cases. (J.A. 79.)

Appeals to the Appellate Department of the Superior Court of Sonoma County resulted in affirmances of the lower court order based upon the holding in *People v. Miller* (1975) 52 C.A.3d 666, 125 Cal. Rptr. 341, but this same Court by unanimous order certified the cases for transfer to the First Appellate District of the California Court of Appeals pursuant to the provisions of Cal.R.Ct. 63(a). Division Four of that court accepted transfer.

(b) The Ward and Berry Cases

In the *Ward* and *Berry* cases judgments of conviction for driving under the influence of alcohol were entered in the Municipal Court of Contra Costa County. The Contra Costa County Appellate Department of the Superior Court affirmed those convictions, but this three judge panel unanimously certified the questions now before this honorable Court to the Third Division of the First Appellate District of the California Court of Appeals. That Division summarily denied transfer. Respondents *Ward* and *Berry* then individually petitioned the California Supreme Court for Writs of Habeas Corpus. That Court, following extensive briefing, ordered the People in *Ward* and *Berry* to show cause before the Fourth Division of the First Appellate District of the California Court of Appeals why relief should not be granted as prayed for by *Ward* and *Berry*.

Division Four of the First Appellate District of the California Court of Appeals (hereinafter *Trombetta* Court), first rendered its decision on March 28, 1983. Following extensive briefing on a motion to reconsider, the *Trombetta* Court filed a modified opinion on April 27, 1983, which did not change the judgment. Petitioners refer to the final decision as *Trombetta II*, whereas there is only one exhaustively well considered *Trombetta* decision in the California Court of Appeal. A Petition for

Hearing in the California Supreme Court was denied on June 23, 1983.

Certiorari was granted herein on January 9, 1984.

FACTS

Each Respondent was arrested for driving under the influence of alcohol. (Formerly, *California Vehicle Code Section 23102(a)*; now *Section 23152(a)*.)

Each was asked to select one of three blood alcohol level tests; blood, breath or urine, pursuant to procedures outlined in *California Vehicle Code* § 13353. The percentage of alcohol in breath and urine is ultimately translated into a percentage of alcohol in the blood. Police officers urged the Respondents to take the breath test and each complied. Each Respondent then submitted to a breath test on the Omicron Intoxilyzer (*Trombetta* opinion, J.A. 154.)

Had any Respondent selected the blood or urine test, the *California Administrative Code* required the remaining portion of the sample be saved for one year for defendants' retesting. (Title 17, *California Administrative Code*, § 1219.1 and § 1219.2, *Trombetta* Exhibit "D" in evidence, J.A. 220-223, R.T. 30-31.) No similar provision is made for breath sample retention although Title 17 of the *California Administrative Code* permits the use of a breath capturing instrument for later analysis (§ 1219.3, § 1221.1(c))², (*Trombetta* Exhibit "D" in evidence, J.A. 223, 229, R.T. 30-31).

²Section 1221.1(c) provides that: "C. Breath alcohol analysis may be performed on samples which are collected with a sample capturing instrument designed for entrapment of a breath sample or for entrapment of the alcohol in a breath sample for later analysis." (Emphasis supplied.)

Consistent with their custom and practice at that time, the police officers made no attempt to and did not retain a sample of Respondents' breath. It was "conceded that no effort was made to capture breath specimens for later testing by the defense." (*Trombetta* opinion, J.A. 158.)

The Respondents were not informed nor did they know that if they selected the breath test as opposed to the blood or urine test, a sample would not be retained for them. Had they been so advised, each would have refused the breath test and selected a blood or urine test so that a sample would be available for retesting. (*Trombetta* Exhibit "C" in evidence, J.A. 205-207, R.T. 30; *Cox*, J.A. 71-74, *Ward*, J.A. 106-107)

At the time of each of these arrests there was available to law enforcement California State Department of Health Services approved equipment making retention and preservation of the breath sample collected for later analysis simple, feasible, inexpensive, accurate, and useful. (J.A. 175-187, R.T. 59-77, J.A. 195-198, R.T. 116, 126-127, 128-130; *Trombetta* Exhibit "A" in evidence, J.A. 200-205, R.T. 26-27, J.A. 81, 102-105.) Significantly, these facts were uncontradicted in any of these four consolidated cases before this Court.

In the proceedings in the case of *People vs. Trombetta*, the Prosecution and *Trombetta* stipulated to the following at the Municipal Court level in Sonoma County. Respondents urge that these stipulations are in and of themselves sufficient to resolve this case in their favor:

1. At no time prior to or after the intoxilyzer test was administered to Respondent did any law enforcement or peace officer advise Respondent verbally or in writing that there would be no sample of his breath preserved for retesting or for any other purpose. (J.A. 165, R.T. 34)

2. At the time and place of the collection of the breath sample on the intoxilyzer there was and is and had been available to the County of Sonoma a device approved by the Department of Health of the State of California for the collection of a breath sample for later testing. (J.A. 165-167, R.T. 34-36)
3. In this case there was no sample collected for the purpose of later analysis. (J.A. 168, R.T. 36, 37)
4. The approved device which collects and captures breath samples (Intoximeter Field Crimper-Indium Tube Encapsulation kit) for later testing is financially feasible for the State to use and is simple to operate. (J.A. 183, 184, R.T. 69)
5. The approved device which collects and captures breath samples for later testing can be used at any place or location, such as at a police station or in the field. (J.A. 183, R.T. 67, 68)
6. The ruling of the lower court herein subject to all proper appellate review would be binding on the Petitioner *People* and the Respondent *Trombetta* at the trial. (J.A. 163-164, R.T. 4-7; J.A. 168, R.T. 37)

Petitioner ignores the stipulations and proceeds as though they do not exist. Petitioner has steadfastly chosen to ignore the entire record in these cases.

In these cases appropriate discovery motions and demands were made on the *People*, inter alia, for the production of breath samples for retesting. (J.A. 6-12, 92-108, 113-121.) It was conceded, as recited in the *Trombetta* opinion, (J.A. 158), that no effort was made to retain breath specimens for later testing by the defense.

Respondents introduced uncontradicted evidence by testimony³ and declaration which, in several instances, was

³For some of Mr. Murray's qualifications see J.A. 168-175.

corroborated by an expert called by the People. Summarized, the evidence established:

1. There is and was an approved method of collecting breath samples for later testing, (which continues to be approved), and had been available to law enforcement in California since 1973. A description of the approved device is set forth in *Trombetta* Exhibit "E" in evidence, (J.A. 247, R.T. 31-32) (Testimony of Donald Murray J.A. 175-176, R.T. 59, 60);
2. There are other methods of preservation of breath samples for retesting, such as the Silica gel cylinder, used in Colorado, which may be utilized in conjunction with the Omicron Intoxilyzer with a minor modification thereto. (This adaptation has not yet been approved for use in California but Petitioner in the briefing upon this appeal scrupulously avoids setting out the reasons for failure to approve Silica gel (Testimony of Donald Murray J.A. 191-193, R.T. 82-84);
3. The Omicron Intoxilyzer is non-specific for alcohol and can and does register false positive readings under certain conditions e.g. acetone (Testimony of Donald Murray J.A. 187, 188-191, R.T. 77, 79-82);
4. The Gas Chromatograph Intoximeter, is and was an approved device for use in California for the testing of breath samples for alcoholic content and approved for use in conjunction with the Intoximeter Field Crimper-Indium Tube Encapsulation Kit, (hereinafter referred to as Kit) (Testimony of Donald Murray J.A. 175-183, R.T. 59-67). The Gas Chromatograph Intoximeter is specific for alcohol and does not register false positives as

does the Omicron Intoxilyzer, and is therefore more reliable and trustworthy (Testimony of Donald Murray J.A. 187-188, R.T. 75-77);

5. That samples of breath collected by use of the Kit may be retested from three months to one year following collection with scientifically reliable results (Testimony of Donald Murray J.A. 184-186, R.T. 71-75);
6. The retest using the Kit will prove or disprove the accuracy of the test made on the Omicron Intoxilyzer (Testimony of Donald Murray J.A. 190-191, R.T. 81-82; Testimony of Eugene Person, Prosecution Expert, *Trombetta* Hearing J.A. 196-199, R.T. 129-130);
7. That a subsequent breath sample collected within a few minutes from the time of collection of the original samples on the Omicron Intoxilyzer would be a valid comparison sample for the determination of the accuracy of the Omicron Intoxilyzer results (Testimony of Donald Murray J.A. 193-194, R.T. 106, 107; Testimony of Eugene Person J.A. 196-198, R.T. 128-30);
8. That prior to the use of the Omicron Intoxilyzer by law enforcement in Sonoma and Contra Costa Counties, each county routinely used the Kit, and the laboratories under contract with law enforcement in each county, analyzing Kit breath samples for alcohol content, routinely retained breath samples from the Kit for referee retesting upon request by the defendant. When these two counties began doing their own testing through law enforcement's laboratory, each county consciously abandoned the saving and preservation of a breath sample but continued retention of blood

and urine samples. Each county thereafter adopted the Omicron Intoxilyzer as the breath testing device knowing it would not preserve a sample of breath for later testing and each county chose not to use the approved available device, (the Kit), to preserve a sample for retesting (*Trombetta* Exhibit "A" in evidence; Declaration of Jerry W. Curry J.A. 200-205, R.T. 26-27; Declaration of Mr. Kenneth Parker J.A. 103-104; Declaration of Richard Kiszka; Testimony of Donald Murray J.A. 188, R.T. 79).

Eugene Person, the *only* expert witness ever produced by the People in any of these cases now before this court, testified in the *Trombetta* hearing as follows:

Direct Examination

"Q. What is your current occupation?

A. I'm a criminalist employed by the State Department of Justice, working at the Santa Rosa Laboratory.

Q. How long have you worked at the Department of Justice?

A. I have been with the Department of Justice approximately 11 years, perhaps 12. I have been at the laboratory here since it opened in 1975.

Q. In your work with the Department of Justice, have you been certified as a forensic alcohol analyst?

A. I'm certified as a forensic alcohol supervisor. (J.A. 194-195, R.T. 116.)

. . .

Q. Mr. Person, from what you have told me, this —the Intoxilyzer machine does not purge itself without the air pump use, does it?

A. It would over a considerable period of time, but not within the immediate time frame of an analysis.

- Q. You haven't done any tests to determine how long it takes for the Intoxilyzer chamber to purge itself without the assistance of the air pump, have you, sir?
- A. No, sir. I just know it's more than a ten, fifteen, twenty minute period.
- Q. Just ten, fifteen?
- A. I say it's longer.
- Q. But you wouldn't know whether it was an hour, five hours or a day, would you?
- A. No, sir, I wouldn't. (J.A. 195, R.T. 126-127.)

• • •

- Q. All right. So this pump is designed to kick enough clean air through there to clear out all of the contaminated air from any suspect or from a simulator solution; is that right?
- A. That's correct, yes.
- Q. Because you wouldn't want to take another test if there was some contaminated vapor in there that was other than clear or air blank; is that right?
- A. Well, you couldn't get an accurate test.
- Q. That's right. Now, Mr. Person, there is no law in the State of California and no regulation in the State of California that would prohibit a police agency from having an Intoximeter Field Crimper Indium Tube Encapsulation kit available at the police station to collect a separate sample before or following any test run on the Intoxilyzer; isn't that correct?
- A. Well, there's no law that I know of that says that any of the approved instruments could not be kept at one location.
- Q. In other words, you might have all three of them there and use all three?
- A. There's no law that says you can't as far as I'm aware.
- Q. You're aware that the Intoximeter Field Crimper can be utilized separate and apart from the In-

toxilyzer machine to collect a breath, are you not?

- A. That's the only way it can properly be used.
- Q. Now, Mr. Person, if you were to administer as an operator of Intoxilyzer 4011 AW machine to test on a suspect and you went through all the procedure on the Intoxilyzer to do that and then you collected another sample using the Intoximeter Field Crimper within a few minutes following the test on the Intoxilyzer, you would expect, would you not, that the test collected by the Field Crimper would be a valid sample and would co-relate in qualitative integrity for testing as against the Intoxilyzer test, would you not?
- A. Well, since the procedure you speak of, the Indium Tube Encapsulation kit or whatever, since it has been approved by the Department of Health who did run tests on it before approval for breath testing, I would have no reason to suspect that any sample taken according to directions with that particular method would not be valid as much as one taken by another method.
- Q. That's what I was driving at. And if it was taken within a few minutes following the Intoxilyzer test, you would regard that as a valid sample for checking against the Intoxilyzer, would you not?
- A. I would see no reason to have a check.
- Q. Well, regardless of whether you would feel that there was a reason to have a check or not have a check, such a sample collected by the Crimper in your opinion would be a valid sample to test against the Intoxilyzer, would it not?

Mr. Tansil: Objection; argumentative.

The Court: Overruled.

The Witness: I would expect the two to agree, but I'm not sure who I'd say was checking who.

By Mr. DeMeo:

Q. But you'd expect the two to agree?

A. I would expect it, yes. (J.A. 196-198, R.T. 128-130).

. . .

Q. Are you also familiar with Title XVII regarding the collection of breath analysis by the various machines that are authorized by the State of California?

A. In general. I'm sure I've read them, but I can't say that I specifically recall any particular point.

Mr. DeMeo: I'd like to, if I might, approach Mr. Person.

The Court: Sure.

By Mr. DeMeo:

Q. Directing your attention to Article Five which speaks of collection and handling of samples, Section 1219. Are you familiar with that provision that requires that samples taken for forensic alcohol analysis and breath alcohol analysis shall be collected? Are you familiar with that?

A. I'm familiar with the article, yes.

Q. And are you familiar with the specific section on breath analysis which speaks in terms of the collection of the breath sample?

A. Yes, I am familiar with the word being used.

Q. Are you also familiar with the approval issued by the State of California on the Intoxilyzer 4011 model which indicates that immediate analysis of breath samples collected by direct expiration of the subject into the instrument in which the measurement of alcohol concentration is performed? Are you familiar with that?

A. Yes, I'm aware of that.

Q. Can you state whether or not the procedural guide that you have told us about that's in the book or wherever concerning the operation of the Intoxilyzer, does it talk about the collection of a sample?

A. Now that you specifically mention it, I'm not certain, but it possibly does.

Q. In fact, it does talk about the collection of a sample, does it not, with the Intoxilyzer machine?

A. As I said, I'm not sure.

Mr. Tansil: Objection; asked and answered.

The Court: This is cross-examination.

The Witness: Very probably it does.

By Mr. DeMeo:

Q. 'Very probably it does.' Is that your answer?

A. Yes, in the same sense that the regulations speak of collections." (J.A. 198-199, R.T. 131-132.)

* * *

The Declarations of Jerry W. Curry (J.A. 200-205); Kenneth W. Parker (J.A. 102-105); and of Richard E. Kiszka, Ernest J. Williams and Manley J. Luckey, the latter three of which Declarations were submitted with the Traverse/Denial to Return to Order to Show Cause in the *Ward* Habeas Corpus Proceeding, shed further light on the questions of feasibility and usefulness of preservation. The declarations of Richard E. Kiszka, Ernest J. Williams and Manley J. Luckey are set out verbatim below:

Declaration of Richard E. Kiszka

"I, RICHARD E. KISZKA, declare as follows:

My name is Richard E. Kiszka. I am presently employed as Laboratory Director of California Forensic Laboratory, Inc. I have been employed in the field of Forensic Toxicology for approximately fifteen years. During this time I have personally analyzed over 50,000 biological samples to determine their alcohol content for various Law Enforcement agencies in the State of California. I have been in my present position since June of 1979. I was previously employed as the Forensic Toxicologist for the San Mateo County Coroner's Office for approximately five years, during which time I was certified Forensic Alcohol Supervisor in charge of the Forensic Alcohol Blood, Breath and Urine Testing Program in San Mateo

County. The Omicron Intoxilyzer Model 4011 was and still is the breath testing device used in San Mateo County.

Presently, I am licensed by the State Department of Health Services as a Clinical Toxicology Technologist and I am a Board Certified Toxicologist. I have qualified as an expert witness in well over 1000 cases in both Municipal and Superior Courts in this State.

Breath testing is the least regulated chemical test by the Department of Health Services for determining a blood alcohol equivalent.

The Intoxilyzer Model 4011A as used in Contra Costa County does not require a calibration check before or after each subject tested on these instruments.

The newest version of the Intoxilyzer Model 4011 ASA is used in two states, Texas and Louisiana. These two states require a calibration check before or after the subjects tested. This instrument operates by push button, not dials.

The Intoxilyzer Models 4011, 4011AW and 4011A have all demonstrated that they are subject to intermittent malfunctioning, especially in the printing mechanisms.

The Intoxilyzer Models 4011, 4011AW, and 4011A have been demonstrated to be non-specific for ethyl alcohol.

The Intoxilyzer Model 4011A does not require any modification to its basic design to have the exhaust tube from the breath chamber be extended out of the side of this device.

The exhaust tube would then be in the same configuration as in the Models 4011, 4011AW and 4011AR.

There is a method available utilizing a device called a Silica Gel tube that can capture and preserve the ethyl alcohol from a breath sample previously captured by the Intoxilyzer.

This method was developed by Luckey Laboratories specifically for use with the Intoxilyzers. Furthermore, this method has been evaluated by the State

Crime Labs of Arizona, Colorado, and Delaware. The evaluations demonstrate a high degree of accuracy and reliability and is specifically being used in Arizona and Colorado for the purpose of capturing the sample from the breath chamber.

At this time the Dept. of Health Services does not regulate the re-testing of blood, urine, or breath samples. A Silica Gel tube used for this purpose would therefore not fall under the regulations for Forensic Alcohol Labs and would not be evaluated by the Dept. of Health Services.

There is a device approved for the field capturing of a breath sample called the Indium Crimper which was previously available in Contra Costa County. In switching to the Intoxilyzer, they obviously made a conscious choice to switch to a method which would no longer preserve a breath sample. The crimping device is capable of trapping three aliquots of a single breath sample. Two portions would be analyzed by the prosecution and one part would be available for retesting. If properly collected, stored and analyzed they have been demonstrated to be reliable for testing up to at least sixty days.

I have personally conducted approximately 50 tests with the Silica Gel tubes and the Intoxilyzer. The Silicia Gel tubes were analyzed utilizing a gas chromatograph procedure. I found a high degree of agreement between these tube results and the Intoxilyzer results.

There are other methods which can be used to capture a breath sample from the Intoxilyzer using Calcium Sulphate or charcoal, as examples

However, the Silica Gel tubes are available from a local supplier and are inexpensive. The present price per tube (if bought in lots of 1000) is eighty-five cents each.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on June 15, 1982 at Foster City, California.

/s/ Richard E. Kiszka"

Declaration of Ernest J. Williams

"I, Ernest J. Williams, declare as follows:

1. I am a graduate of University of Texas at Arlington, Texas, with a Bachelor of Science degree in Chemistry. I also possess a Masters degree in Criminalistics from California State University at Los Angeles, California.

2. My relevant professional experience consists of seven (7) years as a criminalist with two different police agencies, the Los Angeles Police Department and the Long Beach Police Department.

3. I have been the owner and operator of my own criminalistics laboratory, Analytical Forensic Laboratories at 11669 Firestone Boulevard in Norwalk, California for the past year and a half. Analytical Forensic Laboratories specializes in the re-analysis of blood, breath and urine samples for alcohol content, as well as the evaluation of the subjects demeanor at various blood alcohol levels and physiological aspects of effects of alcohol consumption.

4. My appearances in courts of law as an expert witness have been in excess of two hundred and sixty (260) in number and have been primarily at the municipal court level, however I have also appeared at the superior court level. My appearances have been primarily in Los Angeles County, however I have also appeared in the counties of Ventura, Orange, San Diego, San Bernardino, Mono, Sacramento and Monterey as well as Anchorage, Alaska.

I have also appeared before the Criminal Justice Committee, of the California Assembly, in February 1981, to discuss chemical tests for alcohol determination.

5. A breath alcohol test result obtained on any breath testing instrument can be checked for accuracy if the arresting agency captures and saves a portion of defendant's breath within a reasonable time, before or after, the suspect submits to the breath test. If no breath testing instrument is available, the breath sample can still be saved for later analysis, and this is a practice followed by the San Bernardino County

Sheriff's Department for prosecution purposes when a subject elects to take a breath test and the nearest breath testing instrument is located at a considerable distance from the point of arrest. The device currently available for capturing the breath sample for later analysis, the Indium Tube Encapsulation, has been tested for accuracy by the Department of Health and approved for use in the State of California. This device would cost the arresting agency approximately Ten dollars (\$10.00) per test, a sum of money that falls easily within the Thirty-Five dollars (\$35.00) received from the State of California by the arresting agency for each conviction of drunk driving which Thirty-Five dollars (\$35.00) is for the specific purpose of paying the costs of analysis. See Penal Code § 1463.14.

The breath sample captured by the indium tube encapsulation device provides a breath sample equivalent to the breath sample analyzed by the breath testing instrument. This indium tube sample would technically be comparable to that portion of a blood or a urine sample remaining in a sample vial after a portion of that blood/urine had been removed by the laboratory analyst and destroyed via analysis. Just as an analysis by an independent laboratory of the remaining blood/urine sample can be used to determine the accuracy of the prosecuting agencies original analysis performed on that portion of the blood/urine sample destroyed during their analysis, the captured breath sample can be used to determine the accuracy of the breath-alcohol analysis performed by any breath testing instrument.

6. The types of errors in breath-alcohol analysis that could be corrected/detected by the analysis of a captured breath sample by an independent laboratory are the following:

1. Saliva is known to be rich in alcohol content if the alcohol in the blood is distributed throughout the body. Because of this fact, eleven states will permit a suspect arrested for driving under the influence of alcohol case to submit a saliva sample to determine that subject's blood-alcohol level. The relationship between alcohol in saliva and alcohol in breath is that saliva

will contain approximately 2300 times more alcohol than an equal volume of breath. When one considers the quantity of alcohol detected by breath testing instruments for a reading of 0.10%, for example, the intoxilyzer instrument detects 0.007 drops of ethyl alcohol, the potential for error resulting from the breath sample being contaminated with saliva becomes readily apparent. A breath sample captured by the indium tube encapsulation method does not have this problem because this method uses a filter between the mouthpiece and the capturing tube. The Intoxilyzer instrument does not have this filter device. Therefore, if a breath test result done on an intoxilyzer is erroneous because of contamination with saliva, this error could be detected by analysis of the captured breath by an independent laboratory.

2. In the case of a breath testing instrument known as the Intoxilyzer, specificity can be a problem. The Intoxilyzer does have the ability to respond to chemical compounds other than ethyl alcohol. The number of chemical compounds that the Intoxilyzer can respond to, and report as an erroneous high blood alcohol content, can be conservatively estimated as numbering in the tens of thousands. The instrument that would be used to analyze captured breath samples, the Gas Chromatograph Intoximeter, is a more specific instrument than the Intoxilyzer. Therefore, if the Intoxilyzer was used to test the original sample any erroneously high breath test result from the presence of chemical compounds other than ethyl alcohol would probably be detected by using the more specific instruments, i.e. the Gas Chromatograph Intoximeter.

3. A captured breath sample would also serve to detect malfunctions that may occur in the breath testing instrument at the time of the defendant's test by allowing an independent laboratory to determine if their results compare favorably or unfavorably with the original breath test result.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on June 16, 1982, at Cerritos, California.

/s/ Ernest J. Williams"

Declaration of Manley J. Luckey

"I Manley J. Luckey declare as follows:

1. My qualifications are attached hereto as exhibit A.

2. I invented and developed the Mobat Sober-Meters and Alco-Analyzer Gas Chromatograph and my Company, Luckey Laboratories Inc., manufactures and distributes these devices.

3. Among the breath testing devices described in item 2 above, are the Silica Gel Preserved Sample Tubes. The Silica Gel Preserved Sample Tubes preserve the total amount of alcohol from the Intoxilyzer during a breath analysis.

4. The Silica Gel method of absorption of vapors is well defined in chemical procedures — its been used by chemists for years.

5. My Laboratory has used Silica Gel for capturing ethyl alcohol vapors in human breath for 15 years and recently I was the primary consultant for the Intoxilyzer manufacturer (C.M.I.) for the installation of the Silica Gel Preserved Sample Tubes on the Intoxilyzer for use in Colorado, Delaware, Arizona and elsewhere as required, and these Preserved Sample Tubes have proved, under rigorous analysis and routine usage, to be extremely accurate and precise.

6. The Silica Gel Preserved Sample Tube has also enhanced the Intoxilyzer by making it possible to sub-sequentially analyze the specimen of breath for specific chemical components and such reanalysis if performed on an Alco-Analyzer Gas Chromatograph or any other Gas Chromatograph can be specific for ethyl alcohol and other drugs. The Silica Gel Preserved Sample Tubes absorb all vapors from a breath sample and a subsequent analysis by a Gas Chromatograph can differentiate between various chemical components.

7. In my opinion based on years of research in this particular field, breath testing devices, these Silica Gel Preserved Sample Tubes combined with the Intoxilyzer machine (model 4011A or any model of

Intoxilyzer) will provide an inexpensive, authoritative and accurate method for a confirmatory retest that is specific for ethyl alcohol. With the addition of Silica Gel Preserved Sample Tubes, the Intoxilyzer can be used to effectively preserve a sample for later retesting which the Intoxilyzer instrument alone does not accomplish. And, said Silica Gel Preserved Sample Tubes can readily be later retested for verification by the Defendant on a Gas Chromatograph if he chooses. Without the Silica Gel Preserved Sample Tubes, the Intoxilyzer captures, collects and possesses a breath sample during its analysis of said breath sample but the Intoxilyzer does not preserve a sample.

8. All breath testing instruments can be modified to use Silica Gel Preserved Sample Tubes without harming the instruments original intended testing capability.

9. The longevity of the Silica Gel Preserved Sample Tubes is indefinite. This Laboratory has tested Silica Gel Preserved Sample Tubes for longevity and the tubes have been definitely found to yield accurate retesting results for at least 8 months.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on June 17, 1982 at
San Bernardino, California
/s/ Manley J. Luckey"

EXHIBIT A

Resume of Manley J. Luckey

Resume of Manley J. Luckey: Qualifications for expert witness in the field of alcohol and its effect upon driving.

1. Graduate chemist from the University of Loma Linda 1950 with a B.A. Degree in Chemistry.
2. Director of the Chemistry Department at County Hospital in San Bernardino as Bio-Chemist and Toxicologist for 1½ years.
3. Established Luckey Laboratories Inc. over 30 years ago which specializes in the field of alcohol analysis.

4. Acted as Chemist and Toxicologist for over 27 Counties in California doing their Drunk Driving analysis and testifying in court.
5. Have testified in Courts throughout the United States.
6. Have testified more than 5000 times in Drunk Driving Trials.
7. Owner and Director of Luckey Laboratories Inc., which manufactures sobriety testing equipment that is used all over the world.
8. Have written manuals on the operation of Breath Testing equipment as well as Training Manuals in the field of operation of Breath Testing Equipment.
9. Have published articles in this filed in the Journal of Forensic Science.
10. Inventor and holder of patents for the following equipment, the Alco-Analyzer, Sober-Meter, Mobat, Drink-O-Meter and the Silica Gel Preserved Sample Tube.
11. Trained States and Local Law Enforcement groups in the correct use of Breath Testing Equipment.
12. Trained Chemists, Health Departments and State Laboratories in alcohol analysis procedures.
13. Certified Forensic Alcohol Supervisor in the State of California.
14. Member of the Northwest Association of Forensic Scientists.
15. Used as consultant in this field by Federal, State and local groups."

(Record, Traverse/Denial to Return to Order to Show Cause—Ward, Exhibits A, B and C.)

It is Respondent's understanding that the United States Supreme Court, in their review of this litigation, must view it through the window of the record. The record in this case as is evidenced by the declarations of experts Kizka, Williams and Luckey, among others, is replete with evidence supporting Respondents' position while the record is bare of evidence supporting the Petitioner's position. The only logical reason for the bareness

is that the Petitioner was unable to present competent experts with contrary opinions.

It is significant to note that the Petitioner did not produce any counter declarations of experts or otherwise to:

1. the declarations of Kiszka, Williams and Luckey in the Habeas Corpus proceedings in the *Ward* case;
2. the declaration of Parker in the Municipal Court in the *Ward* case;
3. the testimony and the declarations in the *Trombetta* and *Cox* cases.

Subsequent to the Colorado Supreme Court decision in *Garcia v. District Court, 21st Jud. Dist.* (Colo. 1979) 589 P.2d 924, the Colorado Department of Health adopted Rules and Regulations Relating to Chemical Tests for Blood Alcohol which require preservation of breath samples for referee analysis at the request of the defendant and specify various approved methods for preservation for later analysis. Among those devices approved for collection for later retesting are the Silica Gel cylinder method used in conjunction with the Omicron Intoxilyzer and also the Kit is approved for collection for later analysis. *Trombetta* Exhibit "F" in evidence, J.A. 267-290, R.T. 32-33. The previous existing rules and regulations in use in Colorado, before the *Garcia* decision are also a part of Exhibit "F". See J.A. 259-267.

As *Trombetta* Exhibit "F" shows, the law and the Rules and Regulations relating to chemical tests for blood alcohol in Colorado before *Garcia* were similar to those in California at the time of *Trombetta*.

Although the materiality of a breath sample on the central issue of guilt or innocence of one accused of driv-

ing under the influence is obvious, that which makes the materiality even more apparent is the presumption which existed under California law at the time of the instant arrests. California Vehicle Code Section 23126 at the time of these arrests created a rebuttable presumption of guilt where the alcohol level was .10 percent by weight of alcohol in the person's blood.

The new California statute enacted since these arrests is more potent wherein it creates a stronger presumption of guilt on a blood alcohol level of .10. See California Vehicle Code Section 23152(b).⁴

It is in the foregoing setting that the constitutional issues involved here should be considered.

SUMMARY OF ARGUMENT

In the Petitioner's Summary of Argument, it makes no reference to the record in this case. That omission is readily understandable because the record in this case establishes clearly that at the time of arrest of each Respondent, law enforcement had the capability of preservation of breath samples for independent analysis at Respondents' expense; that the instrument used by law enforcement, (the Omicron Intoxilyzer) is, in addition to other problems, non-specific for alcohol, e.g. acetone registers as alcohol; that a method for preservation of breath samples had been approved by the State of California, (the Kit); that other scientifically reliable means of preservation of breath samples were available, (the Silica gel cylinder); that the methods of preservation of breath samples are simple, physically and financially feasible,

⁴Section 23152 driving under the influence" . . . (b) it is unlawful for any person who has .10 percent or more, by weight, of alcohol in his or her blood to drive a vehicle."

and that the test results on the preserved samples would produce scientifically accurate results which would verify the accuracy or establish the inaccuracy of the law enforcement test and would, therefore, be material on the question of guilt or innocence of the accused; that one method of retesting the sample preserved by the Kit or Silica gel cylinders is on an approved device, the Gas Chromatograph Intoximeter Mark II or IV which are specific for alcohol and more scientifically reliable than the Omicron Intoxilyzer.

The administering and taking of a breath test has as its primary function obtaining evidence on the question of guilt or innocence of the subject and is the most determinative type of evidence available to convict in a driving under the influence case. It is therefore obviously material to the central issue of guilt or innocence. Where law enforcement's test results are inculpatory and give rise to a presumption of a violation of law if .10 by weight of alcohol or greater is found in the person's blood, it is even more essential that a sample be preserved for referee analysis because the test performed by law enforcement may have been invalid or erroneous. The failure to preserve a sample, despite the technology to do so, effectively precludes a defendant from having a fair trial, as the evidence, if preserved for retesting "might have affected the outcome of the trial". *U.S. v. Agurs* (1976) 427 U.S. 97, 104, 49 L.Ed.2d 342, 350.

The character of this evidence is a body substance from the defendant himself and the harm to defendant by its non-preservation can obviously be devastating. To deny defendant a retest of his own body substance where the technology exists is the breach of such a fundamental right that due process is violated.

Due process, as set out in *Brady* and developed in *Agurs* and *Bryant*, and recognized in *Augenblick*, requires, that where the state has gathered, collected or possessed evidence that is material in nature, as it is here, (the accused's own body vapor), it must make an earnest effort to preserve that evidence or its equivalent for the defendant's use. Failure to do so should result in an exclusion of the results of the test at trial.

Petitioner argues that *California Vehicle Code* Section 13354(b) provides a "right" to an accused to obtain his own test and that this provides him with all the due process to which he is entitled. This "right" is hollow because at the time of these arrests there was no requirement that Respondents be informed of, nor did they know of this "right". The State should not be able to shift its duty to preserve material evidence to the Respondent without at least advising him of the shift. Further, such a test would be untimely and subject to the criticism that because of the time necessarily elapsing between the two tests, the results of the later test are not relevant. Involved also are the practical problems of locating an expert willing to perform such testing, probably after business hours, and the accused's ability at that time to meet the significant cash demands of the expert. The circumstances can be likened to an attempt to persuade a doctor to make a housecall. Because of the disparity in resources, it is far easier and more useful to the parties involved for law enforcement to preserve a sample for retesting rather than rely on the empty promise of *California Vehicle Code* § 13354(b).

At the very least, due process requires that where destructive testing is utilized by law enforcement, the accused should be informed that no evidence will be preserved for retesting, so that the accused may make an informed choice of what chemical test to choose. (In California, samples of

blood and urine are required to be retained for one year for retest by the defendant, *Trombetta* Exhibit "D", J.A. 207, R.T. 30-31).

Since *Trombetta*, emergency legislation has been enacted in the form of *California Vehicle Code Section 13353.5*. This section requires the accused be informed that the testing equipment does not retain a breath sample and that none will be retained. The Section also requires that law enforcement advise the person that because no breath sample will be retained, the person will be given the opportunity to provide a blood or urine sample for subsequent analysis.

Respondents contend that they were also denied Equal Protection of the Law again under the 14th Amendment. Title 17 of the *California Administrative Code* requires preservation of blood and urine samples for defendant's independent testing, but is silent on preservation of a breath sample. Suspects of driving under the influence of alcohol are similarly situated no matter which of the three available tests they choose and, as the record below establishes, there is *no* reason why a sample of the breath cannot be preserved. Presumably, the reason for the discriminatory treatment was that, when these Administrative Code provisions were enacted, there was no technology to retain breath. That justification became invalid many years ago with the development of reliable breath preservation techniques. Further discussions of this argument is omitted because this Court did not request briefing on this issue.

ARGUMENT

I.

Where Material Evidence Which Might Have An Effect On The Outcome Of A Trial Is Collected And Possessed By The State In A Criminal Case As It Is With The

Omicron Intoxilyzer Which Collects And Possesses A Suspect's Breath, [A Body Substance], Federal Due Process Requires That Where The Technology Now Exists, Law Enforcement Agencies Establish And Follow Rigorous And Systematic Procedures To Preserve The Collected And Possessed Evidence Or Its Equivalent For Retesting By The Suspect, At His Expense.

In *Brady v. Maryland* (1963) 373 U.S. 83, 87, 10 L.Ed.2d 215, 218, the genesis of the due process right of defense access to material information, this court explained that:

"We now hold that the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution.

The principle of *Mooney v. Holohan* is not punishment of society for misdeeds of a prosecutor but avoidance of an unfair trial to the accused. Society wins not only when the guilty are convicted but when criminal trials are fair; our system of the administration of justice suffers when any accused is treated unfairly. An inscription on the walls of the Department of Justice states the proposition candidly for the federal domain: 'The United States wins its point whenever justice is done its citizens in the courts.' A prosecution that withholds evidence on demand of an accused which, if made available, would tend to exculpate him or reduce the penalty helps shape a trial that bears heavily on the defendant. That casts the prosecutor in the role of an architect of a proceeding that does not comport with standards of justice, even though, as in the present case, his action is not 'the result of guile,' to use the words of the Court of Appeals. 226 Md., at 427, 174 A.2d, at 169."

Developing these cogent observations, this court announced in *United States v. Agurs* (1976) 427 U.S. 97, 103, 49 L.Ed.2d 342, 350:

"A fair analysis of the holding in *Brady* indicates that implicit in the requirement of materiality is a concern

that the suppressed evidence *might have* affected the outcome of the trial." (emphasis added.)

In the case of *United States v. Bryant* 439 F.2d 642, 647-648 (1971 D.C. Cir.) the court discussed the prosecutor's duty to preserve a secret tape made of conversations between the suspects and an undercover agent from the Bureau of Narcotics and Dangerous Drugs during a drug sale in a hotel room. The tapes contents were unknown and it was admitted that the government made no effort to preserve the tape. The court did not know whether the tape would corroborate or impeach the agents testimony. The court explained:

"In the leading Supreme Court decisions concerning the due process requirement of disclosure, the content of the non-disclosed evidence has always been known. The standard of constitutional coverage thus has turned upon the extent to which the evidence is 'favorable' to the accused. Although the Supreme Court has not yet attempted to define this standard with precision, it is the law in this circuit that the due process requirement applies to all evidence which 'might have led the jury to entertain a reasonable doubt about (defendants') guilt, and that this test is to be applied generously to the accused when there is 'substantial room for doubt' as to what effect disclosure might have had.

Were *Brady* and its progeny applicable only when the exact content of the non-disclosed materials was known, the disclosure duty would be an empty promise, easily circumvented by suppression of evidence by means of destruction rather than mere failure to reveal. The purpose of the duty is not simply to correct an imbalance of advantage, whereby the prosecution may surprise the defense at trial with new evidence; rather, it is also to make of the trial a search for truth informed by all relevant material, much of which, because of imbalance in investigative resources, will be exclusively in the hands of the Government."

Further, the court held that the prosecutor's duty to disclose first becomes applicable once the government has gathered and taken possession of the evidence. Otherwise, prosecutors could thwart their duties to disclose by destroying vital evidence before prosecution begins. The court held:

"Hence we hold that before a request for discovery has been made, the duty of disclosure is operative as a duty of preservation. Only if evidence is carefully preserved during these early stages of investigation will disclosure be possible later." *United States v. Bryant* (1971 D.C. Cir.) 439 F.2d 642, 651.

The use here by California law enforcement of a device to collect and test material evidence without preservation of such evidence or its equivalent where there is a present ability to do so is:

"... tantamount to suppression of that evidence. It is incumbent upon the state to employ regular procedures to preserve evidence which the State agent, in the regular performance of his duties, could reasonably foresee 'might be' 'favorable' to the accused." *Garcia v. Dist. Court, 21st Jud. Dist.* (Colo. 1979) 589 P.2d 924,930. (J.A. 25)

In a California Supreme Court decision, *People v. Nation* (1980) 26 Cal.3d 169, 161 Cal.Rptr. 299, the non-preservation of a semen sample in a rape case was the issue before the court. The court reasoned that where there is no opportunity to examine the suppressed evidence (as it is here in *Trombetta* because of no retention of the same or a similar breath sample, and where no effort to preserve was made) because of its destruction by the authorities, the evidence will be deemed to be material for purposes of due process if there is a reasonable possibility that it would be favorable to the accused on the issue of guilt or innocence. An analysis of a breath sample in the present cases might

here not only impeach the credibility of the prosecution test but might completely exonerate the defendant. Here, in *Trombetta*, law enforcement used equipment which it knew did not allow for preservation of a sample and admittedly took no steps to preserve a substantially similar sample. Law enforcement must not be permitted to make this decision of preservation for a person accused of a major misdemeanor that carries serious consequences on conviction, including incarceration, fine, driver's license' suspension which may jeopardize a job and increased cost of auto insurance.

A strong argument can be made that preservation and retesting of a breath sample will serve in many cases to confirm that the accused was indeed driving under the influence and will cause the prompt disposition of these cases by guilty pleas.

The latest California Supreme Court pronouncement on the subject of the duty of preservation of material evidence is found in *People v. Moore* (1983) 34 Cal.3d 215, — Cal.Rptr. —, 666 P.2d 419. There, a unanimous Supreme Court held that a probation department has a due process duty to preserve and disclose a urine sample when that sample and the results of the test on it are used as the basis for revocation of probation. In *Moore*, the defendant had been convicted as a result of his plea of guilty to various drug violations and was granted probation. One of the conditions of probation required the defendant submit to regular narcotics testing. At the direction of defendant's probation officer defendant supplied a urine sample which was subjected to tests indicating the presence of a controlled substance. Defendants' counsel requested inspection of the urine sample but it had been discarded. The court held that evidence of the results of tests of the urine sample must be excluded. In

the court's review of the pertinent authorities on the issue, this unanimous California Supreme Court said:

"This court held that an investigative agency has a duty to preserve and disclose evidence material to the guilt or innocence of the accused (*People v. Hitch*, *supra*, 12 Cal.3d at p. 652) and that the duty arise even in the absence of a request from the defendant. (*Id.*, at p. 650; see also *People v. Nation* (1980) 26 Cal.3d 169, 175 (161 Cal.Rptr. 299, 604 P.2d 1051).)

Hitch relied on the reasoning of *United States v. Bryant* (D.C.Cir. 1971) 439 F.2d 642, which explained that 'before a request for discovery has been made, the duty of disclosure is operative as a duty of preservation.' (*Id.*, at p. 651.) Bryant involved the government's loss of tape recordings of conversations between defendants and government agents which were crucial to the issue of defendant's participation in a narcotics transaction. In concluding that the government had a duty to show that it had used 'rigorous and systematic procedures designed to preserve all discoverable evidence gathered in the course of a criminal investigation.' (*id.*, at p. 652, fn. omitted), the court underscored that '[t]he purpose of the duty is not simply to correct an imbalance of advantage, whereby the prosecution may surprise the defense at trial with new evidence; rather, it is also to make of the trial a search for truth informed by all relevant material, much of which, because of imbalance in investigative resources, will be exclusively in the hands of the Government.' (*Id.*, at p. 648, fn. omitted.)

Other federal courts have suggested that the government's failure to preserve discoverable evidence amounts to a denial of due process: 'Loss or destruction of relevant evidence by the government not only raises general questions of the fundamental fairness of a criminal trial, but may also deny a defendant the right to compulsory process.' (*Government of Virgin Islands v. Testamark* (3d Cir. 1978) 570 F.2d 1162, 1166.)

That the government has an obligation to preserve and disclose material evidence is thus clear.

The question becomes whether the urine sample in this case constituted such material evidence.

When the evidence is no longer in existence, the burden of establishing that the evidence is material is met when the defendant shows that there is 'a reasonable possibility that the evidence, if preserved, would have constituted favorable evidence on the issue of guilt or innocence. (*People v. Hitch, supra*, 12 Cal.3d at p. 649.)' (*People v. Newsome* (1982) 136 Cal.App.3d 992, 1001 (186 Cal.Rptr. 676).) This burden is met when the evidence by its nature could reasonably be used to impeach the credibility of the prosecution witness' testimony regarding the evidence. In this respect, the urine sample in this case is quite analogous to the ampoule in *Hitch*. As the conclusions regarding the test ampoule would have been subject to impeachment, so too there exists a reasonable possibility that independent testing of the urine sample in this case could yield results that would undermine the prosecution's case. This conclusion is bolstered by the testimony of the chief toxicologist, who claimed that '[t]here's a lot of incompetence in this work.' The clear implication of that testimony is that test results could differ depending upon who performed the analysis.

For purposes of materiality, the evidence in this case is also similar to a semen sample obtained from the vagina of a rape victim, which has been found to be necessarily material evidence requiring preservation. (*People v. Nation, supra*, 26 Cal.3d 169; *People v. Newsome, supra*, 136 Cal.App.3d 992, 1001.)

Because the evidence in question is no longer available, it is impossible for this or any court to determine whether in fact the urine sample would have been favorable evidence to the defendant. However, it is the government's loss of evidence that requires speculative inquiry as to its materiality. Of course, when the evidence is available but has been suppressed by the prosecution, the court is in a better position to determine whether the suppressed evidence is substantially material. This court specifically distin-

guished such situations in *Hitch*. Referring to *Brady v. Maryland* (1963) 373 U.S. 83 (10 L.Ed.2d 215, 83 S.Ct. 1194), *Giglio v. United States* (1971) 405 U.S. 150 (2 L.Ed.2d 321, 78 S.Ct. 311), and *In re Ferguson* (1971) 5 Cal.3d 525 (96 Cal.Rptr. 594, 487 P.2d 1234), we stated that in those cases the suppressed evidence was neither lost nor destroyed, therefore 'the court was in a position to examine the suppressed evidence, decide whether or not it was favorable to the accused and ultimately to determine whether or not it was material. . . .'

In this case, the loss of the evidence necessarily means that the defendant will be unable to make a showing of materiality beyond claiming that he did not ingest PCP. This the defendant did by denying in open court that he violated probation." *People v. Moore* (1983) 34 Cal.3d 215, 220-221, — Cal.Rptr. —, 666 P.2d 419.

As in *Moore*, *Trombetta* is a case where the evidence collected and possessed by the State on the Omicron Intoxilyzer was prima facie inculpatory, but there was a failure to preserve the evidence or its equivalent. As a result, the defendant was effectively precluded from re-testing his own body substance to challenge the veracity of the prosecution's evidence.

It is interesting to note that the chief law enforcement officer of the State of California did not advise this court of the *Moore* decision. Respondents submit it was incumbent upon the Attorney General to bring *Moore* to the attention of the United States Supreme Court because this honorable court's decision in *Trombetta* will affect a multitude of other criminal cases involving many types of evidence.

The primary types of evidence in a driving under the influence case are chemical tests and the observed conduct of the accused. Experience tells us juries decide these

cases on the basis of the chemical tests, making the chemical test crucial evidence.

A compelling reason for requiring preservation of a sample of breath of an accused in a driving under the influence case where the Omicron Intoxilyzer is used by law enforcement to measure the alcohol content of the breath is that this Intoxilyzer is non-specific for alcohol. This means that other body derivatives, such as acetone, cause this instrument to register these foreign substances as alcohol. This problem of nonspecificity for alcohol is uncontroverted. An example of where the non-specificity for alcohol of the Omicron Intoxilyzer results in a denial of due process where no breath sample is preserved is with a dieter who produces an increased level of acetone. If a dieter had a blood alcohol level within the legal limit (i.e. .07%) the acetone, errantly measured by the Omicron Intoxilyzer as alcohol, could raise the test result over and above the legal limit (.10%). But for preservation of a sample for retest on a Gas Chromatograph Intoximeter which is able to differentiate between acetone and alcohol, the defendant, his lawyer and law enforcement would never know that the law was not violated and the Omicron Intoxilyzer registered a false positive. Innocent victims have undoubtedly already been convicted of driving under the influence of alcohol as a result of false positive readings by the Omicron Intoxilyzer where acetone was measured as alcohol. That preservation is essential to arriving at due process is borne out by other weaknesses of the Omicron Intoxilyzer such as:

1. machine malfunction;
2. faulty calibration;
3. human errors (arresting police officers administer the Intoxilyzer test unlike the testing of the blood and urine).

The ability of reanalysis to reveal the errors or confirm the accuracy of the test by law enforcement on the Omicron Intoxilyzer indicates the need for preservation of the breath sample or its equivalent.

II.

Responses To What Respondents Perceive To Be The Basic Cases Relied On By Petitioner.

(a) **Petitioner's reliance on United States v. Augenblick is misplaced.**

Petitioner relies on *United States v. Augenblick* (1969) 393 U.S. 348 for the proposition "that the loss or destruction of evidence was not a federal constitutional question with overtones of due process." (Brief for Petitioner, p. 8) On careful examination of *Augenblick* it is clear that this court recognized at page 355, that "... an earnest effort was made to locate them" (referring to the lost tape recording made by government agents of an interview of Augenblick and one Hodges during an investigation resulting in a court-martial of Augenblick). The tapes involved in *Augenblick* had initially existed but were lost, whereas in *Trombetta*, it was "conceded that no effort was made to capture breath specimens for later testing by the defense." (*Trombetta* opinion, J.A. 158). There was no "earnest effort" in *Trombetta* and there was an earnest effort in *Augenblick*.

In *Augenblick*, this court also said at pages 355-366, that "the law officer properly ruled that the government bore the burden of producing them (the tapes) or explaining why it could not do so."

In *Trombetta*, the "government" failed in its burden to produce a breath sample and it had no explanation as to why it could not do so, as the uncontroverted evidence established that the breath samples could have been pre-

served by the "government" but it consciously chose not to do so. Again, the "government" had at one time in Sonoma and Contra Costa Counties saved samples but had stopped doing so before the time of the instant arrests.

The other item of evidence under discussion in *Augenblick*, i.e. the handwritten notes, were not "substantially verbatim" and consequently were insignificant.

(b) **The Trombetta Court appropriately analyzes the decision in *People v. Miller* as being fundamentally erroneous wherein *Miller* postulates that there is no possession of the breath during the Omicron Intoxilyzer testing.**

The petitioner again argues that because the state "never had" the breath, it is an "astounding proposition" to ask that they be accountable for a sample. (Brief for Petitioner, p. 15) The record, which Petitioner again ignores, establishes that in testing on the Omicron Intoxilyzer, breath is gathered, collected and possessed.

The *Trombetta* Court, on the possession issue alone, all but overruled *People v. Miller* (1975) 52 C.A. 3d 666, 125 Cal.Rptr. 341, — P.2d —:

"The *Miller* court determined that 'Hitch [*People v. Hitch* (1974) 12 Cal.3d 641] merely holds that evidence which the prosecution once possessed must be held. The test by intoxilyzer . . . may have gathered evidence in the sense of placing the breath in the chamber but it was not evidence of which the government could 'take possession.' The only element reducible to possession was the printout card which has been preserved. (citation)

We disagree fundamentally with the *Miller* characterization of what happens when a breath sample is taken. That is, in our view, such a taking is a collection of evidence within the Hitch rationale. The question then is whether the specimen may be exhausted in testing without taking available steps to obtain and preserve another specimen for retesting.'" (brackets

added) *People v. Trombetta*, supra, 142 Cal.App.3d at 143, 144, 125 Cal.Rptr. 341 (J.A. 158)

Also, the decision in *Miller* is completely devoid of any evidence regarding then available state-approved equipment to preserve a sample of the breath, mentioning only the Intoxilyzer and the Breathalyzer. *People v. Miller* (1975) 52 C.A. 3d 666, 668, 125 Cal.Rptr. 341. Significantly, the *Miller* decision doesn't even mention the Kit, Silica Gel cylinders or any other of the then available reliable means of breath sample preservation. There is also no mention of the Gas Chromatograph Intoximeter Mark II or IV into which the compartments created by the Kit are inserted to determine blood alcohol content. This test is specific for ethyl alcohol, able, unlike the Omicron Intoxilyzer, to exclude other non-ethyl alcohol vapors. Unlike the *Trombetta* court, the *Miller* court may well not have known that there are and were available, reliable means of preserving breath samples. This may explain the different holdings.

It is also argued that the printout card is all the "evidence" of the test on the Omicron Intoxilyzer to which the defense is entitled. This leaves us only with the footprints. We may speculate on the nature of the beast that left the prints. We may agree or disagree with another person's concept of the beast based on the footprints. Collecting and preserving an independent sample of the substance tested presents us with the beast itself. We may count his scales and measure his tooth and claw.

Finally, the California Administrative Code, which regulates law enforcement in all types of testing for blood alcohol content, is entitled and speaks of "Breath Collection". Title 17, *California Administrative Code*, Section 1219.3 (*Trombetta* Exhibit "D" in Evidence, J.A. 223, R.T. 30-31.)

There is a "collection of evidence" in the use of the Omicron Intoxilyzer.

(c) **State v. Young**, relied on by Petitioner, recognizes as accurate the method of preservation of breath samples, (the Kit), and the reliability of subsequent testing.

Petitioner, throughout these proceedings, has attempted to and continues to decry and diminish the use of the Kit, utilizing such inadmissible references as the notes of a meeting of an ad hoc committee, entitled Advisory Committee on Alcohol Determination, Department of Health. (See Brief for Petitioner, pp. 27-28.) Despite these repeated ventures outside the record, the Kit nonetheless continues to be approved in California and is now used by law enforcement in San Bernardino County to obtain convictions.

Reliance by Petitioner on *State v. Young* (Kan. 1980) 614 P.2d 441, places the Petitioner directly on the horns of a dilemma. Petitioner relies on *Young* because *Young* insists that the Kansas Statute similar to Section 13354 (b) of the California Vehicle Code provides the necessary due process where it accords the accused the "right" to obtain his own later test. The other horn of the dilemma forces Petitioner to accept what Respondents are urging and Petitioner is vehemently denying. That is, that the Kit is a responsible and effective alcohol breath system for preservation when used with the Gas Chromatograph Intoximeter Mark II and Mark IV models, and is more reliable than the Omicron Intoxilyzer because the latter is not specific for alcohol. In *Young*, the Kit and the gas chromatograph were the devices used by law enforcement to obtain convictions for driving under the influence.

III.

Law Enforcement's Failure To Preserve Material Evidence, In The Face Of Available Steps To Preserve Such Evidence Or Its Equivalent, Requires The Suppression Of The Results Of Law Enforcement's Test At Trial.

Respondents urge that in the absence of malicious or deliberate destruction of the evidence (which destruction would require dismissal of the charges of driving while under the influence of alcohol) the constitutional remedy formulated by the *Trombetta* court is a reasonable and just disposition, to wit: the suppression of the results of the breath test at trial, unless law enforcement can establish that they followed a "rigorous and systematic procedure to preserve the captured evidence or its equivalent for the use of the defendant." (*Trombetta* opinion, J.A. 160)

IV.

Section 13354(b) Of The California Vehicle Code Does Not Provide The Suspect With Due Process Because The Suspect Was Not Made Aware Of This "Right" Nor Will The Exercise Of This "Right" Be Sufficiently Timely To Be Relevant And Because Of The Financial Expenditure Attendant Upon The Exercise Of This "Right"...

Petitioner argues that *California Vehicle Code* Section 13354(b) affords due process to a person accused of driving under the influence because it gives such person a right at his own expense, to have "a test by a physician, registered nurse, licensed vocational nurse, duly licensed clinical laboratory technologist or clinical laboratory bioanalyst, or any other person of his or her own choosing." (Brief for Petitioner, p. 19)

The most glaring due process deficiency of this statute is that it did not require that the accused be informed of this alleged "right".

Assuming that the statute did provide for so informing the accused this so-called right is an illusory one at best because:

1. If the arrest occurred after business hours, when most arrests of this type do occur, the retaining of an expert by the defendant would present serious obstacles that would tend to invalidate the results of the subsequent test from the standpoint of the timeliness of the test. It is accepted toxicological doctrine that any chemical test to determine blood alcohol content must be as close to being truly simultaneous as is possible. See *In re Martin* (1962) 58 Cal.2d 509, 512, 24 Cal.Rptr. 833;
2. Assuming such an untimely test is obtained, the prosecution is in the advantageous position of claiming that its test is more accurate because it is closer to the time of the offense;
3. The practical problem of finding an expert to respond at all to such a request is very real, not to mention the ability of a lay person to locate such an expert by use of the telephone directory at the jail house while under the stress of an arrest;
4. Also to be considered is the financial predicament that the suspect would be placed in under such circumstances. The expert who might well be in bed at the time of his requested intervention, would quite likely insist upon a sizeable fee for interruption and would want payment in cash which would likely not be available.

Finally, in spite of the fact that Section 13354(b) is an "empty promise", its existence nonetheless reveals that the legislature recognized the importance of a second test for referee analysis.

V.

California Has Reacted To The Trombetta Decision By Enacting Emergency Legislation, Effective September 15, 1983, Which Requires Law Enforcement To Advise A Per-

son Who Chooses To Submit To A Breath Test That The Breath Testing Equipment Does Not Retain A Sample Of The Breath And For That Reason A Blood Or Urine Sample Will Be Retained At No Cost To The Person For Later Analysis For The Alcoholic Content In His Blood.

Following the *Trombetta* decision emergency legislation was passed and California Vehicle Code Section 13353.5 was enacted to read, in pertinent part:

“(a) In addition to the requirements of Section 13353, a person who chooses to submit to a breath test shall be advised before or after the test that the breath-testing equipment does not retain any sample of the breath and that no breath sample will be available after the test which could be analyzed later by the person or any other person.

(b) The person shall also be advised that, because no breath sample is retained, the person will be given an opportunity to provide a blood or urine sample that will be retained at no cost to the person so that there will be something retained that may be subsequently analyzed for the alcoholic content of the person's blood. If the person completes a breath test and wishes to provide a blood or urine sample to be retained, the sample shall be collected and retained in the same manner as if the person had chosen a blood or urine test initially.

(c) The person shall also be advised that the blood or urine sample may be tested by either party in any criminal prosecution. The failure of either party to perform this test shall place no duty upon the opposing party to perform the test nor affect the admissibility of any other evidence of the alcoholic content of the blood of the person arrested.”

In enacting the above set out statute, the California legislature stated:

“In order to provide a constitutional procedure for administering the breath test in light of the decision of the Court of Appeal in *People v. Trombetta* (1983) 142 Cal.App. 3d 138, it is necessary that this act take

effect immediately." (1983 legislation, Section 4 of Stats. 1983, C.841, p.3)

Petitioner, in discussing this new legislation, states "current California law gives the accused even greater protection". (Brief for Petitioner, p. 20, n.13) Thus, there is no issue for determination by this court because the legislature of California has spoken affirmatively in response to *Trombetta*.

CONCLUSION

Respondents are aware of cases arguably contrary to *Trombetta*, (See discussion of these cases in Respondents' Brief in Opposition to Petition for Writ of Certiorari commencing at page 7 et seq.). In those cases which seemingly hold contrary to *Trombetta*, the record before those courts was inadequate to permit them to insist on preservation of a breath sample. Unlike these courts, *Trombetta* had before it an adequate record. Respondents submit that the better reasoned cases are in accord with *Trombetta*. See among other cases, *Baca v. Smith* (Ariz. 1980) 604 P.2d 617; *Garcia v. District Court, 21st Jud. Dist.* (Colo. 1979), 589 P.2d 924; *Municipality of Anchorage v. Seranno* (AK. 1982) 649 P.2d 256; *State v. Cornelius* (N.H. 1982) 452 A.2d 464; *People v. Hitch* (Cal. 1974) 12 Cal.3d 641, 527 P.2d 361; *People v. Nation* (Cal. 1980) 26 Cal.3d 169, 604 P.2d 1051; *People v. Moore* (Cal. 1983) 34 Cal.3d 215, 666 P.2d 419; *State v. Michener* (Or.App. 1976) 550 P.2d 449; *Lauderdale v. State* (AK 1976) 548 P.2d 376.

Respondents recognize that driving under the influence of alcohol is a current national problem of significant proportion and every lawful step to curb such conduct must be taken. However, Respondents also recognize that in so doing the same traditional observance of the con-

stitutional rights of a suspect must be zealously protected.

An affirmance of *Trombetta* in no way precludes Petitioner from proceeding with the trial of these cases with such other evidence as is available, such as, the observations of the arresting officer as documented in his investigation report, including the field sobriety tests.

For each of the foregoing reasons, Respondents respectfully request that the *Trombetta* decision be affirmed by this Honorable Court.

Dated: March 23, 1984

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No. 83-305

Supreme Court, U.S.
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In The
Supreme Court of the United States
October Term, 1983

THE PEOPLE OF THE STATE OF CALIFORNIA,
Petitioner,
vs.

ALBERT WALTER TROMBETTA, et al.,
Respondents.

**ON WRIT OF CERTIORARI TO THE
CALIFORNIA COURT OF APPEAL,
FIRST APPELLATE DISTRICT**

PETITIONER'S REPLY BRIEF

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PETITIONER'S REPLY BRIEF

ARGUMENT

I

The Facts Necessary For Resolution Of The Issues Are Clearly Presented.

There is a great disparity between the statement of facts included in Petitioner's Brief and that found in Respondents'. The vast majority of the "facts" cited by Respondents are not facts at all, but declarations or testimony advanced in support of their cases at various stages of the proceedings. But there were no factual findings in

Ward or *Berry*, and the facts determined in *Trombetta* (and its derivative, *Cox*) are limited to those relating to the functioning of the Intoxilyzer, as discussed in Judge Antolini's order (J.A. 40-43). The facts found by Judge Antolini are sufficient for purposes of resolving the first question we have addressed to this Court: Does a duty to preserve evidence under federal due process forbid the use in a drunk driving case of a breath test machine which automatically expels and thus destroys the breath sample during the test process?

In their statement of facts, Respondents make much of the "Indium tube," a remote sample capturing device.¹ Use of the indium tube is limited to subsequent analysis with the Intoximeter brand gas chromatograph, for which it is an approved accessory. See California Department of Health Services, List of Approved Instruments and Related Accessories Approved for Breath Alcohol Analysis (December 20, 1979) pp. 6-7, 12. It is not approved for use with any other testing device, including a competing brand of gas chromatograph. *Id.*, at pp. 1, 5, 8-11. It was stipulated in the *Trombetta* case that the indium tube device for capturing a breath sample for later retesting existed when the Intoxilyzer was used to test the defendant (J.A. 182-184). It is, in fact, a matter of public record that the indium tube has been approved in California for remote sample collection since 1974. See California Department

¹There are also repeated references to the greater specificity of the gas chromatograph contained in Respondents' factual statement and utilized as a basis for argument in their brief (i.e., p. 37). The greater specificity of the gas chromatograph has been judicially rejected as a basis for discounting the accuracy of the Intoxilyzer. See *Intoximeters, Inc. v. Younger* (1975) 53 Cal.App.3d 262, 269-270, 125 Cal.Rptr. 864, 869-870.

of Health, Summary of Activities Relating to Evaluation of Instruments and Accessories for Breath Alcohol Analysis, Report No. 2 (Feb. 1974) Table 10, p. 6. But what Respondents overlook is the qualification upon the stipulation, as noted by Judge Antolini, that such devices could not be used with the Intoxilyzer (J.A. 182). Similarly, the defense's own witness testified in *Trombetta* that the indium tube was not approved for use with the Intoxilyzer nor could be physically adapted to it (R.T. 78:22 to 79:3).² Respondents also refer to the silica gel method now used in Colorado throughout their statement of facts, yet concede that "This adaptation has not yet been approved for use in California. . . ." (Respondents' Brief, p. 6) There were no factual findings as to the accuracy of the method.³

²This part of his testimony is omitted from that portion of the transcript which Respondents included in the Joint Appendix; the omission being indicated by asterisks at J.A. 188.

³Not only are there no factual findings in the record regarding the silica gel method, but what the California Court of Appeal did was to rely upon the decision in *Garcia v. Dist. Court*, 21st Jud. Dist. (Colo. 1979) 589 P.2d 924, 928-929—which stated that preservation methods did exist, without specifying them—for its own determination that such methods were available. 142 Cal.App.3d, at 144, 190 Cal.Rptr., at 322-323, J.A. 159. Such blind acceptance was unwise. See *Montoya v. Metropolitan Court* (N.M. 1982) 651 P.2d 1260, 1261. The developer of the "Toxitrap" silica gel tube has now conceded that: "It is scientifically impossible to achieve the same degree of precision and accuracy in samples that are trapped, desorbed, and reanalyzed than are achieved using frequently calibrated, stationary primary evidential breath testing equipment." Letter of Dr. Donald R. Wilkerson, 29 J. Forensic Science 7 (1984).

That states such as Colorado may permit attacks upon an evidential breath testing instrument with a trapped sample having an 80% error rate is an evidentiary choice Colorado is free to make, but should not be constitutionally impressed upon California or any other state which insists that sample-retention systems have the same degree of accuracy as evidential breath-test devices.

As Judge Antolini's order notes—and it does not appear to be challenged by Respondents—"Without an addition to the present intoxilyzer unit it appears to the court that it would be impossible to exercise permanent control resulting in preservation of any sample." (J.A. 41.) The record clearly establishes that no approved device exists to preserve a breath sample analyzed on an Intoxilyzer.

Indium tubes and silica gel tubes are really red herrings. The existence or non-existence of any breath capturing device is in fact irrelevant to the question Petitioner has presented to this Court. The facts in this case demonstrate that the law enforcement agencies involved did *not* use a device which preserved anything for the defendant's use, and that the instrument actually utilized automatically destroyed the temporarily-captured sample after the analysis was performed. What Respondents suggest is that the Constitution requires use of an instrument which preserves something. This outlines the second question we have presented to this Court: Does a duty to preserve evidence under federal due process compel law enforcement to gather evidence for use of the defendant? For if law enforcement must utilize an entirely separate device—such as an indium tube or anything else—to collect another sample for the defendant, then it is indeed in the business of collecting evidence for the defense, a step far beyond anything ever required by this Court.

II

Emergency Legislation Has Not Rendered The Issues Moot.

Adverting to new California Vehicle Code section 13353.5, respondents and their *amici* seem to suggest that

the *Trombetta* problem has been "solved" and that the issue is now moot.⁴ That is not correct. There has been no

⁴This legislation was enacted in direct response to the dilemma which *Trombetta* poses: a requirement to utilize an instrument which keeps something for defense referee testing, but no instruments or devices which do so. See Cal.Stats. 1983, ch. 841, sec. 4 (5 Deering's Adv. Leg. Serv. 756). It was emergency legislation which went into effect on September 15, 1983.

By means of a letter of July 20, 1983, the California Department of Health had previously advised all forensic alcohol laboratories that:

"[A]ttachment of a breath sample-capturing device to an approved breath testing instrument can void the approval. Approval of a breath testing instrument extends only to that instrument and its accessories approved by the Department of Health Services through laboratory evaluation [citation]. To date, no breath testing instrument with an accessory for directly capturing the breath sample has been approved. If any . . . laboratory supervising the use of breath testing instruments wishes to attach a sample-capturing device to an already-approved instrument without voiding approval of that instrument, it may do so only by obtaining approval of the Department . . . of the sample-capturing technique [citation]. To be considered for approval, the laboratory must submit its precautionary checklist and its experimental data demonstrating that an instrument, after modification, continues to meet the standards set forth in the regulations [citation]. To be considered for approval, the laboratory must submit its precautionary checklist and its experimental data demonstrating that an instrument, after modification, continues to meet the standards set forth in the regulations [citation].

" . . . [A]pproval of a sample-capturing technique in conjunction with an approved instrument will not extend to the sample-capturing device itself, but is limited to the instrument as modified by the sample-capturing technique. No sample-capturing device has been approved by the Department . . . for referee analysis. . . . At the present time, however, the Advisory Committee on Alcohol Determination has concluded that no breath sample-capturing device exists that has the scientific reliability of a breath testing instrument." (Footnote omitted.)

(Continued on next page)

judicial construction of the statute, which was enacted in light of the concurring opinion in *Trombetta II*.⁵ See 142 Cal.App.3d, at 145, 190 Cal.Rptr., at 323, J.A. 161. Whether the California courts will find the emergency legislative remedy adequate to the constitutional purpose is unknown. But if there is no constitutional duty to preserve a breath sample for the defense and no violation in utilizing an instrument which automatically expells a sample only temporarily collected, then the issue will never arise.

In any event, the new legislation has no applicability to the parties directly before the Court. Furthermore, dependent upon how the California courts interpret the passage in *Trombetta II* which applies the rule to other persons "only after this decision has become final," 142

(Continued from previous page)

Similarly, the Ad Hoc Committee on Breath Alcohol Sample Retention of the Public Health Liason Committee of the California Association of Criminalists in a letter of April 3, 1984, has indicated (p. 4) that:

"It is clear from the available literature that there are limitations to the reliability of all of the currently available breath capture devices. Therefore, the finding of different results using a capture device as compared to an immediate breath test instrument cannot be construed to mean that the breath instrument was in error. On the contrary, the most likely explanation would be that the capture device was in error."

The retention and reanalysis difficulties caused this committee to recommend *against* breath sample retention for referee purposes, and utilize blood or urine instead. (*Id.*, at pp. 4-6.) This is the current state of California law. Cal. Veh. Code, section 13353.5.

⁵The *Trombetta I* majority opinion did mention the possibility of a waiver of collection rights. 141 Cal.App.3d, at 406, J.A. 145. This language ominously disappeared from *Trombetta II*.

Cal.Appd3d, at 144, 190 Cal. Rptr., at 323, J.A. 160, the rule of *Trombetta* may apply to thousands of drunk drivers who were tested before the statute was enacted.⁶

Even after the statute became effective, numerous California cases are still affected by *Trombetta II* since in the initial days after emergency passage, officers were frequently unaware of the new statute and did not give the admonition until new directives informed them of this change.

Furthermore, enactment of California Vehicle Code section 13353.5 does not alter the fact that the question presented here is of significant continuing national importance. Breath-testing instruments are utilized in every state, the District of Columbia, and Puerto Rico. The question of the necessity of sample retention thus vitally impacts virtually every law-enforcement agency subject to the jurisdiction of this Court. In our petition for certiorari (pp. 13-14), we noted that several state courts have already addressed the issue with varying results. *Amicus* briefs in support of Petitioner's position have been filed literally from every corner of the country, clearly demonstrating the national concern over the decision below, and underscoring the importance of a decision by this Court.

III

The Constitution Does Not Require Proof Beyond All Possibility Of Doubt.

The Constitution does not require proof beyond all possibility of doubt. *E.g., Holt v. United States* (1910) 218

⁶The date of "finality" of the decision is an open question, and is not resolved as the *amicus* brief of the State Public Defender suggests (fn. 5, pp. 7-8), by simply looking to California Rule of Court 25(a). The effect of a stay of remittitur has never been construed.

U.S. 245, 254; *Dunbar v. United States* (1895) 156 U.S. 185, 199. Yet apparently what Respondents and their *amicus* seek is proof of the level of intoxication beyond any possibility of doubt in a drunk driving case, for that is the effect of requiring the preservation of a breath sample for defense testing.

It is the official position of the Advisory Committee for the California Department of Health that in California, "[T]he procedures for 'immediate analysis' of breath samples required by the California regulations leave no room for undetected error because of the scientific confidence derived from these procedures." Advisory Committee on Alcohol Determination, California Department of Health, Notes of Meeting of December 14, 1982, p. 17. A good example is that which is the focus of the *amicus* brief filed by the California Public Defender's Association: radio interference. According to their brief (pp. 30-31), radio transmissions can generate a false reading of as high as .45 on a breath alcohol device. Yet under California procedures, not only must two evidential breath tests be administered upon the subject which must agree by .02, but a total of three "blank" tests must also be run on the instrument with a resultant reading of .00. See *People v. French* (1978) 77 Cal.App.3d 511, 518-520, 143 Cal.Rptr. 782, 785-786. Obviously the false .45 reading would not go undetected, which is the purpose of the California regulatory scheme. Respondents focus upon the possibilities of breath acetone in a breath sample (Respondents' Brief, p. 33). Yet support for this possibility is within the defendant's own grasp, since as a predicate to making such an objection to an Intoxilyzer result he should be required to show that he was dieting and capable,

on that diet, of giving a false positive reading on the Intoxilyzer due to acetone, a demonstration which he can easily make with any existing Intoxilyzer. *Cf. United States v. Valenzuela-Bernal* (1982) 458 U.S. 858, 867, 871. Other "possibilities of error" can be conceived, and similarly rebutted. As this Court has noted, the "possibilities" of error with regard to any kind of evidence are limited only by "the imaginations of judges or defense counsel." *Id.*, at 867. Due process does not require that such possibilities be proven wrong with physical evidence demonstrating otherwise.

Years ago in *People v. Miller* (1975) 52 Cal.App.3d 666, 670, 125 Cal.Rptr. 341, 343, the Court of Appeal pointed out the unsettling result of demanding "absolute proof" by requiring that everything which could be made into some demonstrable form be so transformed. In any criminal case, there are features which are undoubtedly "material" and in fact central to proof of the crime, such as the crime scene itself. But must the crime scene be videotaped from every angle? Must everything at the scene be taken into possession and preserved? Must the crime scene be hermetically sealed to permit full exploration of the facts? Must every witness be tape recorded? Must every note be kept? The possibilities are endless. But such preservation is not required by due process, and is not necessary to insure a fair trial. In the case of the Intoxilyzer, the machine itself remains available for testing; the test protocol is reflected in the printed card; the officer administering the test is available for cross-examination. Due process requires no more.

CONCLUSION

A logical extension of the preservation duty Respondents and the court in *Trombetta II* would require obliges law enforcement to reduce everything to a physical form and keep it in possession for possible use by a defendant. This is not mandated by due process; it is not necessary for a fair trial. The decision below is wrong and should be reversed.

DATED: April 9, 1984

Respectfully submitted,

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No. 83-305

IN THE SUPREME COURT

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UNITED STATES

OCTOBER TERM, 1983

PEOPLE OF THE STATE OF CALIFORNIA,

Petitioner,

v.

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Respondents.

ON WRIT OF CERTIORARI TO THE COURT OF
APPEALS OF THE STATE OF CALIFORNIA

MOTION FOR LEAVE TO FILE BRIEF AMICUS
CURIAE AND BRIEF OF THE APPELLATE
COMMITTEE OF THE CALIFORNIA DISTRICT
ATTORNEY'S ASSOCIATION AS AMICUS CURIAE
IN SUPPORT OF PETITIONER

Appellate Committee of the
California District Attorney's
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MOTION FOR LEAVE TO FILE BRIEF AMICUS
CURIAE IN SUPPORT OF PETITIONER

The California District Attorney's Association is a nonprofit organization which represents the fifty-eight District Attorneys within the State of California. The Appellate Committee of the California District Attorney's Association is a committee created by the District Attorneys of California to utilize and coordinate the resources of District Attorney's offices throughout the State for the purpose of presenting their views in cases which may have major statewide impact upon the prosecution of criminal offenses. The Appellate Committee has filed numerous amicus curiae briefs in the California Supreme Court. It has also filed such briefs in various Federal Courts as well as this Court.

After review of the matter, the Committee concluded that the case at bench will have a substantial impact upon the administration of justice in criminal cases throughout the State of California, if not the entire United States. Accordingly, the Committee has decided to request permission to file an Amicus brief in this case and has asked the District Attorney of Solano County to prepare it.

The concern of the Appellate Committee is that this Court will be speaking for the first time on an issue that is most important to each of the fifty-eight District Attorneys in California: What are the requirements of the Due Process Clause of the Fourteenth Amendment to the United States Constitution insofar as the collection and preservation of physical evidence is concerned. We very strongly believe that the decision by the California Court of Appeal in People v.

Trombetta (1983) 142 Cal.App.3d 138, 190 Cal.Rptr. 319, to the extent it interpreted the due process requirement of the Fourteenth Amendment, has confused the duty of the courts to insure that a trial is fair with the function of legislature.

In Trombetta, the California Court of Appeal held that the results of an intoxilyzer test which determines the blood alcohol content of a person's breath would be inadmissible under the Due Process Clause of the Fourteenth Amendment to the United States Constitution unless "the captured evidence or its equivalent" was retained for retest by person tested.

The Appellate Committee of the California District Attorney's Association's argument about due process is quite simple, as well as straight forward: if results of a scientific

test (such as in the instant situation, the intoxilyzer) is admissible because its results are reliable, due process does not change this result merely because, with the march of technology, a technique has arguably been developed which allows these initial results to be verified at a later date.

The Appellate Committee of the California District Attorney's Association has reviewed all the pleadings filed so far in this Court. We have also reviewed the pleadings which have been filed below. We note that in the Court of Appeal, Amici Curiae appeared on behalf of the respondents. We finally note that because of our concern over the potential impact of Trombetta, the undersigned was requested to, and did, file a brief seeking review in the California Supreme Court.

While in full agreement with each and every argument made by the Attorney


General in this case, the Appellate Committee of the California District Attorney's Association is concerned that this Court should see the full implications of due process.

DATED: February 23, 1984

Appellate Committee of the
California District Attorney's
Association

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BY:


JOHN R. VANCE, JR.
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BRIEF OF THE CALIFORNIA DISTRICT
ATTORNEY'S ASSOCIATION AS AMICUS CURIAE
IN SUPPORT OF THE PETITIONER, THE PEOPLE
OF THE STATE OF CALIFORNIA

This brief is filed pursuant to Rule
36.3 of the Supreme Court Rules.
Consent to file has been granted by the
Honorable John Van De Kamp, Attorney
General of California, Counsel for
Petitioner; consent has been denied by

John F. DeMeo, Esq., Counsel for Albert W. Trombetta. No response has been received as of February 17, 1984, from Attorney for Gregory M. Ward, Thomas R. Kenny, Esq., Attorney for Michael G. Cox, Thomas N. Muldoon, Clinton J. Brown, Densel L. Furner, Patricia L. Keeffe, Herbert J. Berryessa and James K. Schneider, and John A. Pettis, Esq., Attorney for Gail B. Berry, hereinafter called "defendants". A letter of consent of the Petitioner has been filed with the Clerk of this Court.

INTEREST OF AMICUS

The interest of the Appellate Committee of the California District Attorney's Association is as set forth in the motion for leave to file brief amicus curiae.

FACTS AND PROCEDURAL SETTING OF THIS CASE

The operative facts of this case have been thoroughly presented in the opinion

of the California Court of Appeal in People v. Trombetta (1983) 142 Cal.App.3d 138, 190 Cal.Rptr. 319.

Briefly, these operative facts do not turn upon the individuality of each situation--there are ten separate cases before the court--but rather follow similar group characteristics. Each defendant was stopped by a law enforcement officer within the State of California. During the course of that detention, the officer formed probable cause to arrest the driver for driving under the influence of intoxicating liquors.¹ Upon being arrested, each

1. California Vehicle Code, Section 23152(a) and (b), provides: "(a) It is unlawful for any person who is under the influence of an alcoholic beverage or any drug, or under the combined influence of an alcoholic beverage and any drug, to drive a vehicle. (b) It is unlawful for any person who has 0.10 percent or more, by weight, of alcohol in his or her blood to drive a vehicle."

defendant elected to allow the State to make a blood alcohol determination of his breath by means of an instrument known as the Intoxilyzer.

It is the functioning of that machine which is at issue. The Trombetta Court, though summarizing the operation itself, cited with approval the opinion in People v. Miller (1975) 52 Cal.App.3d 666, 125 Cal.Rptr. 341, for an explanation of the machine's functioning. According to Miller, 52 Cal.App.3d at 668-669, 125 Cal.Rptr. at 322:

"The subject's breath is captured in a metal chamber, infrared energy of fixed intensity and wave length is passed through the chamber from one side to a photo-electric cell on the other side. Alcohol absorbs light of the fixed wave length. The device computes the loss of energy, translates the result in terms of the grams of alcohol per 100 milliliters of blood, and prints the result upon a card. In the prescribed operation of the device, clear air is first tested, then the breath of the subject. The chamber is

then purged by blowing clear air through it. The clear air is tested, and all three results appear upon the printed card. The two tests of clear air constitute a test of the machine, and should show zero alcohol content. It is apparent that no test results, save the printout card, was available for preservation."

The Court of Appeal concluded in Trombetta that the Due Process Clause of the Fourteenth Amendment required that when a person was arrested for driving while under the influence of intoxicating liquors, and elected to take a breath test, the results would be inadmissible because the machine did not retain for possible retesting a portion of the sample that had been temporarily collected, and the State did not collect an independent sample of the defendant's breath. (142 Cal.App.3d, at 144, 190 Cal.Rptr., at 323). In the words of the Court: "Due process demands simply that when evidence is collected by the State,

as it is with the Intoxilyzer, or any other breath testing device, law enforcement agencies must establish and follow rigorous and systematic procedures to preserve the captured evidence or its equivalent for the use of the defendant." (Id.)

The Trombetta Court felt that this conclusion was mandated by the decision of the California Supreme Court in People v. Hitch (1974) 12 Cal.3d 641, 117 Cal.Rptr. 9, which in turn was purportedly based upon this Court's decision in Brady v. Maryland (1963) 373 U.S. 83, 87, and the decision in United States v. Bryant (D.C. Cir. 1971) 439 F.2d 642, 647-648.

SUMMARY OF ARGUMENT

The Due Process Clause of the Fourteenth Amendment prevents a criminal trial from being reduced to a farce or sham. Above that minimum, the states may administer their courts in any manner they choose. The California Court of Appeal in

People v. Trombetta (1983) 142
Cal.App.3d 138, 190 Cal.Rptr. 319, did
not follow this very basic distinction.
As the evidence of the result of the
intoxilyzer was admissible before the
advent of possible technology to
"preserve the sample or its equivalent",
the march of technology does not change
what is required by due process.

ARGUMENT

THE DUE PROCESS CLAUSE OF THE
FOURTEENTH AMENDMENT DOES NOT
ENTAIL THAT WHEN A PERSON HAS
BEEN ARRESTED FOR DRIVING UNDER
THE INFLUENCE OF INTOXICATING
LIQUORS AND ELECTS TO TAKE A
BREATH TEST, THAT THE STATE
MUST ALSO PRESERVE THE CAPTURED
EVIDENCE OR ITS EQUIVALENT IN
SOME MANNER.

The Due Process Clause of the
Fourteenth Amendment protects each of
use from conviction for a criminal
offense without "due process of law".
While indeed due process is not a static
concept, Frank v. Maryland (1959) 359

U.S. 360, 371-372; Rochin v. California (1951) 342 U.S. 165, 170, to hold, as the California Court of Appeal did in this case, that the State must preserve "the captured evidence or its equivalent" is a gross abuse of judicial discretion.

It is an abuse of discretion because the results are not needed to insure a fair trial. As such it does a grave disservice to the rights of each of use to be governed by our duly elected legislators. It also does a grave disservice to the rights of each of us to be free from the menace--a menace many times all too deadly--of the drunk driver. This menace has been recognized both by this court, South Dakota v. Neville (1983) ___ U.S. ___, ___, 74 L.Ed.2d 748, 755 ("The situation underlying this case--that of the drunk driver--occurs with tragic frequency on our Nation's highways. The carnage caused by drunk drivers is well documented

and needs no detailed recitation here"); Breithaupt v. Abram (1957) ____ U.S. 432, 439 ("The increasing slaughter on our highways, most of which should be avoidable, now reaches the astounding figures only heard of on the battlefield"), and by the California Supreme Court, Burg v. Municipal Court (1984) 35 Cal.3d 257, 261-262, 198 Cal.Rptr. 145, 146 ("The drunk driver cuts a wide swath of death, pain, grief, and untold physical and emotional injury across the roads of California and the nation.").

This Court has clearly over many years, and in many cases, defined the meaning of due process in a criminal trial. In the seminal case of Lisenba v. California (1941) 314 U.S. 219, this court said, "As applied to a criminal trial, denial of due process is the failure to observe the fundamental fairness essential to the very concept of

justice." 314 U.S., at 236. Mr. Justice Roberts continued in that case by saying, "In order to declare a denial of it we must find that the absence of that fairness fatally infected the trial; the acts complained of must be of such quality as necessarily prevent a fair trial." 314 U.S., at 236. In Rochin v. California (1952) 342 U.S. 165, Mr. Justice Frankfurter said, "[I]n reviewing a state criminal conviction under a claim of right guaranteed by the due process clause of the Fourteenth Amendment from which is derived the most far reaching and most frequent basis for challenging state and criminal convictions, 'we must be deeply mindful of the responsibilities of the states for enforcement of criminal laws, and exercise with due humility our negative function in subjecting convictions from state courts to the very narrow scrutiny which the due process clause of the

Fourteenth Amendment authorizes'". 342 U.S., at 168. Mr. Justice Frankfurter continued, "Regard for the Due Process Clause 'inescapably imposes upon this Court an exercise of judgment upon the whole course of proceedings [resulting in a conviction] in order to ascertain whether they offend those canons of decency and fairness which express the notions of justice of English-speaking peoples even toward those charged with the most heinous offense.'" 342 U.S., at 169. Explaining Rochin in Breithaupt v. Abram (1957) 352 U.S. 432, 436 this Court said, "[D]ue process is not measured by the yardstick of personal reaction or the sphygmogram of the most sensitive person, but by that whole community sense of 'decency and fairness' that has been woven by common experience into the fabric of acceptable conduct. It is on this bedrock that this court

has established the concept of due process." Mr. Justice Douglas said for this court in United States v. Augenblick (1969) 393 U.S. 348, 356, "But apart from trials conducted in violation of express constitutional mandates, a constitutionally unfair trial takes place where the barriers are so relaxed or forgotten . . . that the proceeding is more a spectacle . . . or trial by ordeal than a disciplined contest." Coming forward finally a few more years, Mr. Justice Powell wrote, "The right of an accused in a criminal trial to due process is, in essence, the right to a fair opportunity to defend against the state's accusations." Chambers v. Mississippi (1973) 410 U.S. 284, 294.

The touchstone, then, of due process is the assurance of a fair trial. As such this Court finds due process as setting forth what could only in reality be said

to be a minimum. Above that minimum there are many social choices left to the states in the manner that trials may be conducted. Brown v. Mississippi (1936) 297 U.S. 278, 285 ("The State is free to regulate the procedure of its courts in accordance with its own conceptions of policy . . . [But] it does not follow it may substitute trial by ordeal."); Rochin, supra. Depending upon one's view, these choices, when made, may provide more or less of an opportunity for fairness. But above this minimum these are choices to be made by the legislature, not dictated by the courts.

The California Court of Appeals in Trombetta could only have reached the conclusion it did by committing what perhaps is a subtle but yet substantive mistake. To find that due process required preservation of "the captured

evidence or its equivalent" the Court, by necessity, was finding that the only way that a defendant could determine the validity of the results was to conduct a test on "the captured evidence or its equivalent". If indeed the validity of the results can only be determined by such a procedure, then the results when such technology does not exist would be, by definition, inadmissible. But yet, if that is not the case--and it is not--then the converse cannot also be true. The Appellate Committee of the California District Attorney's Association submits that the logic of Trombetta eschewed this contradiction, and founders upon it.

The scientific acceptance, and hence, the concomitant admissibility of breath alcohol testing has been well established in California. (People v. Suddeth (1966) 65 Cal.2d 543, 546, 55 Cal.Rptr. 393,

395; Lawrence v. City of Los Angeles (1942) 53 Cal.App.2d 6, 8, 127 P.2d 288, 289.) While this Court has never spoken to the issue of what is required for the admissibility of evidence based upon a scientific principle, other courts including California's have. The seminal case in this area must be the decision in Frye v. United States (D.C. Cir. 1923) 293 F. 1013. The essence of the Frye test is whether the scientific procedure is reliable. (293 F. at 1014; People v. Kelly (1976) 17 Cal.3d 24, 30, 130 Cal.Rptr. 129, 134.) Reliability in the context of the intoxilyzer is simply the accuracy of the methodology. Breath testing equipment in California must be approved by the California Department of Health. Their expertise has been accepted both by the Legislature, Cal. Health & Saf. Code, § 436.50, and the

courts, People v. French (1978) 77 Cal.App.3d 511, 521, 143 Cal.Rptr. 782; and Intoximeters, Inc. v. Younger (1975) 53 Cal.App.3d 262, 271, 125 Cal.Rptr. 864, People v. Miller (1975) 52 Cal.App.3d 666, 670, 125 Cal. Rptr. 341. The accuracy and reliability of breath-testing instruments is particularly well-assured in California:

"First, the instrument on which the immediate analysis is performed is one which has been evaluated and found to meet the required performance standards. From the periodic determinations of accuracy there is current evidence with regard to the accuracy of that individual instrument. There is no human manipulation associated with the test: the subject's mouth is on the instrument, the subject breathes directly into the instrument, the instrument collects the appropriate breath sample, the instrument does the analysis without any manipulation by the operator (this is the reason for technically untrained officers being permitted to perform breath tests [Section 1221.1(b)(1)]), the result is calculated by the instrument and the test result

is recorded in printed form by the instrument. Adding to this the fact that California requires the analysis of two separate breath samples which cannot differ from each other by more than 0.02 grams percent, there is not scientific need to retain a breath sample because there is no room for undetected error." Advisory Committee on Alcohol Determination, Dept. of Health, Notes of Meeting of August 31, 1982, p. 31.

It is indeed so well established that no appellate court in California has ever excluded the results of the intoxilyzer--the instrument in question in Trombetta--on the grounds of lack of scientific reliability, nor did--and this is most important--the Trombetta court. The issue to be decided in Trombetta was defined by them in the following terms: "The issue raised is whether intoxilyzer breath results are rendered inadmissible in a trial for driving under the influence of intoxicating liquor by virtue of the failure

of law enforcement officials to preserve a retestable breath sample." 142 Cal.App. 3d, at 140, 190 Cal.Rptr., at 320. Later in their opinion, they said "In the present cases, it is conceded that no effort was made to capture breath specimens for later testing by the defense. Defendants contend that the intoxilyzer evidence should therefore have been excluded from trial." 142 Cal.App.3d, at 143, 190 Cal.Rptr., at 323.

That the technology might exist to preserve an untested sample of a defendant's breath might well be relevant consideration for a policy decision by a legislator.² But it is wholly irrelevant for a due process analysis by a court, and therein lies the flaw in the Court of

2. Whether or not such policy arguments were considered, one legislature did enact such a requirement. Vt. Stats. Ann. tit. 23 § 1203(a) (1981).

Appeal's opinion: it was not a violation in their view of due process to admit the the results until the technology existed. If it was not a violation of due process in the first instance, it cannot be now made so by the advance of technology.

Due process is not license. Breithaupt, supra. It is rather a very disciplined as well as well defined constitutional precept. Frank, supra. That is not to say that it is static. Rochin, supra. Yet while dynamic it is not endowed with the power to elevate ordinary policy determinations--policy determinations which have nothing at all to do with a fair trial--to ones of constitutional dimension. Augenblick, supra; Lisbena, supra.

The Trombetta court justified their decision in the following manner.

They found, contrary to the trial court,³ and contrary to another appellate court (People v. Miller (1975) 52 Cal.App.3d 666, 125 Cal.Rptr. 341) that the intoxilyzer did collect the breath of the subject, i.e., physical evidence. 142 Cal.App.3d at 143-144, 190 Cal.Rptr. at 322. They also "found" that there existed a device whereby an actual sample of breath may be collected for later analysis by an expert of the defendant's choosing (an "intoximeter field crimper--indium tube encapsulation kit"). Id. Whereupon they fashioned a requirement of preservation of the "captured evidence or its equivalent," 142 Cal.App.3d at 147, 190 Cal.Rptr. at 323, based upon, as noted, Hitch.

3. There was only testimony taken on this issue in one of the ten cases before this Court. It was People v. Albert Trombetta. The trial judge found that no sample was collected. See decision, J.A., p. 40.

To Hitch, then, and the cases Hitch relied upon, Brady and Bryant, we must turn. Rather than start with Hitch, we shall start where Hitch began: Brady v. Maryland.

In Brady this Court found that the suppression by the prosecution of a confession of a co-defendant which was exculpatory violated the Due Process Clause of the Fourteenth Amendment. This Court fashioned the following rule "We now hold that the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to the punishment irrespective of the good faith or bad faith of the prosecution." 373 U.S., at 87.

The other case relied on extensively by Hitch was Bryant. While Brady is clear, Bryant itself is not and by the

time it was interpreted by the California Supreme Court, the principle of Brady had been wholly lost.

The confusion engendered by Bryant stems from its analysis of destruction of a tape recording in a menage of both constitutional and statutory authority, all under the aegis of this Court's decision in United States v. Augenblick (1969) 393 U.S., at 348.

For the purpose of Bryant, at issue in Augenblick was a tape recording made of a confession. At the trial, the existence of a tape recording was disclosed. 393 U.S., at 353-354. But the government was unable to produce it. Id., at 354. This court found that indeed the tapes should have been preserved under the Jencks Act--which describes certain discovery procedures in criminal cases (18 U.S.C.

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§ 3500)⁴--and disclosed, but found that the failure to produce it was not sufficient { to infect the defendant's conviction. 393 U.S., at 356.

The Augenblick Court explained--and it is this explanation which the Bryant court ran afoul--"Indeed our Jencks decision and the Jencks Act were not cast in constitutional terms . . ." 393 U.S., at 356. Significant for determining the ambit of the decision, the Augenblick Court said in a passage completely ignored by Bryant: "[The court below] in a conscious effort to undo an injustice, elevated to a constitutional level what it deemed to be an infraction of the Jencks act and made a denial of discovery which 'seriously impeded his right to a trial' a violation of the Due Process Clause of the

4. It is derived from Jencks v. United States (1967) 353 U.S. 657.

Constitution.'" 393 U.S., at 356. But this Court disagreed. No error--certainly no error of constitutional magnitude--had been committed by the loss of the tape. This Court wrote, "It may be that in some situations, denial of production of a Jencks Act type of statement might be a denial of a Sixth Amendment right." (Id.) Lest there be any mistake that what this Court was positing was indeed a hypothetical situation, the Court continued by saying, "But certain it is that this case is not a worthy candidate for consideration at the constitutional level." (Id.) As we have noted above, this Court said, "But apart from trials conducted in violation of express constitutional mandates, a constitutionally unfair trial takes place only where the barriers and safeguards are so relaxed or forgotten . . . that the proceeding is more a spectacle . . . or trial by ordeal, . . . than a disciplined

contest." Id. And Augenblick's was not such a trial. Id.

Bryant involved the "loss" of tape recordings made by police officers of purchases of narcotics. Under the Jencks Act,⁵ the court held that the tape recording was one that should have been preserved and disclosed. (439 F.2d, at 649-650.) Bryant then turned to sanctions for its loss. Interpreting Augenblick, the Bryant court indicated that the "key" would be the circumstances of its loss. 439 F.2d, at 651. "[Augenblick] also suggests that, while sanctions should be imposed in cases of bad faith suppression of evidence, an exception will be made for good faith

5. The court also relied on Rule 16(a), Fed. R. Crim. P. which provides "for Court ordered discovery of 'written or recorded statements or confessions made by the defendant.'" and Rule 16(b) which "makes discoverable before trial 'books, papers, documents, tangible objects . . .'" 439 F.2d., at 649.

loss." Id. All of this Bryant found to be "explicitly based on constitutional reasoning." Id. Finally Bryant found that where evidence has been destroyed, the convictions will not be reversed only so long as "the government made 'earnest efforts' to preserve critical materials and to find them once a discovery request is made." Id.

In interpreting Augenblick, the Bryant court made two basic errors. Augenblick was not "explicitly based on constitutional reasons". At most the Augenblick court indicated that in some circumstances the denial of production of a Jencks Act type of statement "might be a denial of a Sixth Amendment right." Augenblick, supra, 393 U.S., at 356. This Court in Augenblick explicitly held that where the ultimate fate of a missing tape remains "a mystery," such does not implicate the Due Process Clause. Id.

The second error is as fundamental. The Bryant court contrasted their situation with Brady in the following way: in Brady the nature of the lost evidence was known, Bryant, supra, 439 F.2d, at 647. Whereas in their case the nature of the lost evidence was not. Bryant, supra, 439 F.2d, at 647-648. We disagree. The lost tape recordings at issue in Bryant were of conversations with a government agent who related them in court. Id., at 645. The Bryant court said about these tapes, "[I]t is possible, after all, that the tapes might have revealed [that the agent was mistaken in his recollection.]" 439 F.2d, at 645 (emphasis added). Without wholly debasing the meaning of the word "possible", there was no possibility within any meaningful sense. The only available evidence established that such a result was impossible.

In the same sense that Bryant used the word "possible," it would then be possible that everyone present at the conversation talked only about football, opera or philosophy, or that the tape would reveal that no one at all was present, not even the agent. Using the meaning of "possible" ascribed to it by the Bryant court, anything is "possible." Such contingent speculation demeans due process. In infusing due process with such contingent speculation, it runs afoul of Augenblick. In Augenblick, this Court did not speculate that the lost tape might have indicated that the defendant did not, contrary to the testimony of the police officer, confess. 393 U.S., at 355-356. By not so speculating, this Court clearly had indicated that contingent speculations are not the stuff of due process. Bryant, then, is a very bad decision.

We now come forward to Hitch. Hitch, like Trombetta, involved a prosecution for driving while under the influence of intoxicating liquors. In Hitch, the defendant elected to have his breath tested by means of a machine called "Breathalyzer". (12 Cal.3d, at 644, 117 Cal.Rptr., at 11.) In essence, the defendant would blow into the breathalyzer which collects his breath in a test ampoule. Id. Then by means of a light beam this test ampoule would be compared to a known reference ampoule. Id. Both ampoules were capable of preservation, but both were destroyed. (12 Cal.3d, at 645-646, 117 Cal.Rptr., at 11-12.) Based upon Brady and more particular Bryant, the California Supreme Court found Federal Due Process to have been transgressed by this destruction and consequently held that there was a duty to preserve the

test ampoules. (12 Cal.3d, at 645-646, 117 Cal.Rptr., at 11-17.) The California Supreme Court thereby committed the same error as was committed by Trombetta; if the only way the accuracy of the machine can be determined is by checking the actual samples themselves, then the results in the first instance should not be admissible.

As of this date, more cases have rejected Hitch, vis-a-vis retention of ampoules from breathalyzers, than have followed it. See State v. Phillipe (Fla. App. 1981) 402 S.2d 33, 34; People v. Stark (Mich. App. 1977) 251 N.W.2d 574, 575-577; State v. Teare (N.J. Super. 1974) 336 A.2d 511, 513; People v. LaPree (Rochester City Ct. 1980) 430 N.Y.S.2d 778, 781-781; State v. Larson (N.D. 1976) 313 N.W.2d 750, 755-756; State v. Shutt (N.H. 1976) 363 A.2d 406, 407; State v. Watson (Ohio App. 1975) 355 N.E.2d 883,

884-885; Edwards v. State (Okla. Crim. App. 1976) 544 P.2d 60, 62-64; Edwards v. Oklahoma (W.D. Okla. 1976) 429 F.Supp. 668, 670-671, rev'd on other grounds, 577 F.2d 1119 (10th Cir. 1978); State v. Newton (S.C. 1980) 262 S.E.2d 906, 909; State v. Helmer (S.D. 1979) 278 N.W.2d 808, 810-811; Turpin v. State (Tex. Crim. App. 1980) 606 S.W.2d 907, 916-917; State v. Canady (Wash. 1978) 585 P.2d 1185, 1187-1188. Following Hitch are: Lauderdale v. State (Alaska 1976) 548 P.2d 376; Scales v. City Court (Ariz. 1979) 594 P.2d 97; People v. Richter (N.Y. Sup. 1980) 423 N.Y.S.2d 610; State v. Michneer (Ore. App. 1976) ___ P.2d 449; State v. Booth (Wis. 1980) 295 N.W.2d 194.

In People v. Santiago (Sup. Ct., N.Y. Co., 1982) 455 N.Y.S.2d 511, the court rejected Hitch only after conducting a test to see whether Hitch's

assumption that a retest was possible was valid. Id., at 516-517. The result of the test should be shocking to those who believe, as Hitch did, that a retest was possible. Though "possible," the results were not at all accurate; indeed a retest showed that there was alcohol present when there was none in the breath! Id.

In the view of the Appellate Committee of the California District Attorney's Association, an even more significant rejection of Hitch has come from the scientific community. The Committee on Alcohol and Drugs of the National Safety Council said in a formal statement issued on October 2, 1975:

"Some issues have been raised in the California Supreme Court's decision in People v. Hitch and allied cases in which the court held that chemicals and ampoules used in breath test cases must be preserved for possible pre-trial examination and analysis by defendants should they so demand it. A review of the

scientific merits of this position has been made. It is concluded that at the present time, a scientifically valid procedure is not known to be available for the re-examination of a Breathalyzer ampoule that has been used in the breath test for ethanol, in order to confirm the accuracy and reliability of the original breath analysis." 22 J. Forensic Science 486 (1977)."

Recently, Professor John Thornton, an associate professor of forensic science in the Department of Biomedical and Environmental Health Science at the University of California at Berkeley, wrote of Hitch that: (1) there was scientifically no possible way to retest the ampoule, and (2) such analysis "would have been meaningless." Thornton, *Uses and Abuses of Forensic Science*, 69 A.B.A.J. 288, 292 (March 1983). He continued, "The decision . . . was foolish from the standpoint of science." Id.

Hitch was an "accidental" decision. Johnson, The Supreme Court of California

1975-76: Forward: The Accidental Decision and How it Happens (1977) 65 Cal. L. Rev. 231, 234-239. In terms of both science and the law, it was a bad accident.

Hitch, to the extent that it follows Bryant's error, diverges from this Court's definition of due process and the meaning of Brady. The evidence in Hitch was like the tape in Augenblick: neither are like the confession in Brady. In Hitch, it is only contingently possible that a retest would contradict the results. Such speculation does not implicate the Due Process Clause of the Fourteenth Amendment. Lisenba, supra; Rochin, supra; Breithaupt, supra; Chambers, supra; Augenblick, supra.

One court has concluded that indeed Hitch does unjustifiably extend Brady. Edwards v. Oklahoma (W.D. Okla. 1976) 429 F.Supp. 668, 671, rev'd on other grounds, 577 F.2d 1119 (10th Cir. 1978). That

court wrote: "The Hitch court found that it sufficed that there was a 'reasonable possibility' that they [the ampoules from the breathalyzer] might constitute favorable evidence. This extension of the Brady doctrine is not justified as a matter of constitutional law. Brady focused upon the harm to the defendant resulting from nondisclosure. Hitch diverts this concern from the reality of prejudice to speculation about contingent benefits to the defendant. Hitch was, as Trombetta is, but legislation.⁶ As such it provides

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6. One author has also seen through the due process gloss of Hitch. See Note, 75 Colum. L. Rev. 1355, 1376 (1976).

no basis for the Trombetta decision of the California Court of Appeal.⁷

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7. The conundrum that unprincipled application of due process causes can be best seen by the fact that there are many decisions which find no due process violation when a piece of evidence which must be tested to determine its contents is consumed in the testing process. See People v. Vick (1970) 11 Cal.App.3d 1058, 1966, 90 Cal.Reptr. 236, 241-242 (autopsy; body destroyed); People v. Shafer (1950) 101 Cal.App.2d 54, 59, 224 P.2d 778, 780 (chemical test; substance destroyed); State v. Lightle (Kan. 1972) 502 P.2d 834 (chemical test; pills destroyed); State v. Carlson (Minn. 1978) 267 N.W.2d 170 (chemical test; bloodstain destroyed); State v. Cloutier (Me. 1973) 302 A.2d 84 (chemical test; pill destroyed); Partin v. State (Ga. 1978) 232 S.E.2d 46 (chemical test; cocaine destroyed); United States v. Love (5th Cir. 1973) 482 F.2d 213, 218219 (chemical test; gun powder residue destroyed); State v. Thomas (Wash. 1969) 454 P.2d 203 (chemical test; marijuana sample destroyed).

CONCLUSION

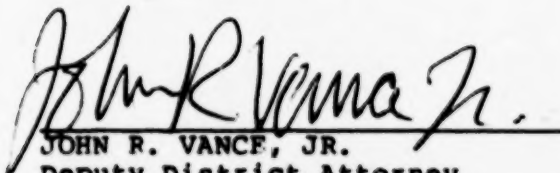
The Appellate Committee of the California District Attorney's Association respectfully submits that for the foregoing reasons the Due Process Clause of the Fourteenth Amendment does not require that the State obtain either "the capture of evidence or its equivalent." The decision of the California Court of Appeal must be reversed.

DATED: February 23, 1984

Respectfully submitted,

Appellate Committee of the
California District Attorney's
Association

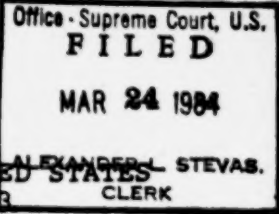
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NO. 83-305

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1983



○
THE PEOPLE OF THE STATE OF CALIFORNIA,
Petitioner,

v.

ALBERT WALTER TROMBETTA, et al.,
Respondents.

○
ON WRIT OF CERTIORARI TO THE
CALIFORNIA COURT OF APPEAL,
FIRST APPELLATE DISTRICT

○
BRIEF OF AMICUS CURIAE IN
SUPPORT OF RESPONDENTS

○
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NO. 83-305

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1983

____○____

THE PEOPLE OF THE STATE OF CALIFORNIA,
Petitioner,

v.

ALBERT WALTER TROMBETTA, et al.,
Respondents.

____○____

ON WRIT OF CERTIORARI TO THE
CALIFORNIA COURT OF APPEAL,
FIRST APPELLATE DISTRICT

____○____ -

BRIEF OF AMICUS CURIAE IN
SUPPORT OF RESPONDENTS

____○____

INTEREST OF AMICUS CURIAE

The organizations filing this Amicus Curiae brief are comprised of members who represent persons charged in drunk driving cases. These organizations have an interest in avoiding a resolution of the issues presented in this case on the facts claimed by petitioner, since those facts are not those in the record and found by the lower court. In addition, these organizations have an interest in not having a broad decision in an area where many of the pertinent facts are not disclosed by this record. Finally, the passage of an intervening statute renders the questions presented in this case of no further importance in California.

SUMMARY OF ARGUMENT

The entire basis of Petitioner's position is the claim that no device exists which can preserve the breath of a defendant for use in a drunk driving prosecution. Thus, petitioner concludes that the issue is whether due process prevents the use of a breath-testing machine which cannot preserve a breath sample. In fact, there is a device which can preserve a breath sample for later retesting. This fact was the basis for the decision of the California Court of Appeal, and was shown without contradiction in the trial record. Thus, the factual record in this case does not permit a determination of the Question Presented as framed by petitioner.

Apart from the facts as they actually exist in this case, there are additional facts relating to this area

of scientific inquiry. Those additional facts affect the accuracy of the breath-testing machine, and show that only through the use of the device which preserves a breath sample can an accurate result of a suspect's blood alcohol level be determined for a drunk driving prosecution. Thus, this case does not present a complete factual record on which broad due process determinations can be made, and in fact presents only an issue of limited effect.

As petitioner recognizes, a new statute has been enacted relating to this area. California Health and Safety Code section 13353.5, effective September 15, 1983, now provides that when an arrestee in a drunk driving case takes a test on a machine which does not preserve a sample of that breath, the arrestee must be advised of the right to a preserved sam-

ple, and must either take a second test which will be preserved or waive the right to a preserved sample. Thus, the use of the breath testing machines which destroy the breath sample has been protected, even under petitioner's analysis, since either a second, preserved test is taken, or an express waiver of the right to a preserved test occurs. Therefore, the issues presented by petitioner cannot occur in any future case in California.

ARGUMENT

I

AN APPROVED DEVICE EXISTS WHICH PRESERVES A BREATH SAMPLE AT THE TIME OF A TEST; THUS, THE QUESTION ON WHICH THIS COURT GRANTED CERTIORARI IS NOT AT ISSUE IN THIS CASE

The factual premises of petitioner in this case are quite clear. Petitioner's entire brief is premised on his claim that there is no device--that is, no device exists--which can collect and preserve a sample of the breath of a suspect in a drunk driving case, so as to permit that breath to be retested for a blood alcohol reading at a later time. Petitioner claims that the breath

testing machines1/ currently in use completely destroy the breath being tested, and since there is no other method of preserving the breath, the decision of the California Court of Appeal means that breath-testing machines can no longer be used in California. The entire factual premise of petitioner is untrue.

Petitioner's position can be seen from two passages. Petitioner states, "In other words, there is no device what-

1 For simplicity and consistency, Amicus Curiae will use the term "breath testing machines" throughout this brief to refer to all types of machines used to determine blood alcohol levels by testing breath. In the scientific literature, some of which is referred to in this brief, the technical term for these machines is "Evidential Breath Testers", or "EBT".

soever which would permit the defendant to retest--however unreliably--the same sample is the same form as that tested by the police." (Brief for the Pet., p. 17.) Again, petitioner contends, "Not only are there no breath analysis instruments approved for use in California which themselves capture and preserve a breath sample, but there are no capturing devices approved to attach to them. As a matter of fact, the scientific body which the California Legislature established to advise the Department of Health on matters of this sort (Cal. Health & Saf. Code, Sec. 436.50) has recently concluded that no device currently exists anywhere which would permit a reliable retest of a breath sample. Advisory Committee on Alcohol Determination, Department of Health, Notes of Meeting of August 31, 1982, p. 29." (Brief for the

Pet., pp. 27-28.) These two sentences seem to state that there is no device which can preserve the breath used in a breath test so as to permit retesting of that sample. (See also Brief for the Pet., pp. 15-17, 22, fn. 14.)

It is this factual premise which leads to the issues presented by Petitioner. If there is no way to preserve a breath sample, then the decision of the California Court of Appeal below that the failure to preserve a suspect's breath is a violation of due process of law and requires suppression of the results of any test on that breath leads to the Question Presented by Petitioner: "Does a duty to preserve evidence under federal due process forbid the use in a drunk driving case of a breath-testing machine which automatically expels and thus destroys the breath sample during

the test process?" (Brief for the Pet., p. 1; see also Pet. for Writ of Cert.)

Ironically, petitioner criticizes the California Supreme Court's decision in People v. Hitch (1974) 12 Cal.3d 641, 527 P.2d 361, "because it is simply wrong on the facts." (Brief for the Pet., p. 25, fn. 17.) In fact, Petitioner is simply wrong on the facts as he presents them to this court. Astonishingly, petitioner never recognizes that the entire basis for the decision of the California Court of Appeal below in this very-case was that a device does exist and is approved to capture and preserve a suspect's breath sample in a drunk driving case. (See pp. A-6, A8-9, and A-14 of the opinion of the California Court of Appeal, as numbered in the attachment to the Pet. for Writ of Cert.) That court quite specifically stated, "The question then

is whether the specimen may be exhausted in testing without taking available steps to obtain and preserve another specimen for retesting." (Opn. of the Court of Appeal below, at p. A-14, as numbered in the attachment to the Pet. for Writ of Cert.; emphasis added.)

Petitioner never contends that the factual finding of the California Court of Appeal is without a substantial basis in the trial record. The record in fact shows uncontradicted evidence of the existence, approval and reliability of the device to preserve breath samples. Significantly, in the sections of the Brief for the Petitioner quoted above, Petitioner does not cite any authority or anywhere in the record in support of his claim that no device exists which can preserve a breath sample, except for a reference to the Notes of a Meeting of

an Advisory Committee on Alcohol Determination. These Notes are not part of the record, nor can they overcome the factual finding of the California Court of Appeal and the uncontradicted evidence of the trial record in this case.

These Notes are the minutes of a meeting an Ad Hoc committee of this Advisory Committee and not the Committee itself, which occurred on August 31, 1982. Counsel for petitioner does not disclose that he was personally present at that meeting. (Exh. A to this Brief, cover page.) Of course, the California Court of Appeal issued its Order to Show Cause on several of these cases on April 28, 1982. (Joint Appendix, hereafter "J.A." pp. 4, 5.) Thus, the device at issue was in litigation in the Court of Appeal for some months prior to the meeting of this committee of which counsel for Petitioner

was present.

Petitioner does not mention that on the very page before the one cited to this court, the following entry appears: "Therefore, the Ad Hoc Committee recommended to the Advisory Committee on Alcohol Determination the deletion of remote collection and later analysis from the regulations in title 17." (Exh. A herein, p. 28.) Of course, it is not possible to recommend deletion of something not already approved. Thus, the very Committee Notes cited by Petitioner support the point being made here--the device at issue exists and has been and is now (there is no indication that the Committee's recommendation has been followed) approved for use in California. The Notes of this meeting were not made part of the Joint Appendix in this case. However, the list of instruments

approved by the Department of Health was made part of the Joint Appendix in this case. However, the list of instruments approved by the Department of Health was made part of the Joint Appendix (J.A. pp. 238-258), and includes the approval of the Intoximeter Field Crimper-Indium Tube Encapsulation Kit (J.A. pp. 247, 257-258), the device which preserves breath samples.

The actual page cited by Petitioner hardly supports the flat assertion made about it. Petitioner asserts that the Committee "concluded that no device currently exists anywhere which would permit a reliable retest of a breath sample." (Brief for the Pet., pp. 27-28.) As the attached copy of the page cited, page 29, shows, the actual text is as follows:

"The Ad Hoc Committee next considered a series of other issues related to the capture of breath alcohol samples for later analysis. These issues are summarized in the following statements: . . .

"3. There is no reliable and practical way to retain a breath sample for referee analysis inasmuch as there is no breath sample capturing device which can meet the performance standards with regard to: air blank, calibration with a standard solution; quality control with a reference sample."
(Exh. A herein, p. 29.)

Referee analysis is an analysis using the device here at issue by attaching the machine to the breath-testing machine (as opposed to obtaining a sample by having the suspect blow into

the device all by itself, unattached to anything, called "remote analysis.>"). Thus, even the sentence quoted does not show that no device exists at all which can retest a breath sample. The quoted language is something less than an express finding, and may only be a statement of the topic under discussion. In any event, this is not in the record. As noted herein, the trial record clearly shows the existence and approval of the device for preservation and retesting of breath samples.

Petitioner makes only two references to the trial court record, both times merely citing the trial court's statement that "without an addition" to the breath testing machine, there is no sample which can be preserved. (Brief for the Pet., pp. 7-8, 15.) This simply ignores the record in the trial court, where it was

shown without contradiction that the Intoximeter Field Crimper-Indium Tube Encapsulation Kit is a device which can be used, either attached to the breath-testing machine or separately, to accurately preserve a breath sample for later retesting. The trial court made no adverse finding on this point, nor would the evidence have permitted any such finding. In fact, the parties in the trial court, including a representative of the People, expressly stipulated that the device was approved and available to take a breath sample for later testing. (J.A. pp. 165-168; 183-184.) The list of instruments approved for use in California, including the device at issue herein, was submitted to the trial court as Exhibit D, and is found at the Joint Appendix, pp. 238-258. Moreover, there was uncontradicted testimony in

the trial court from expert witnesses to the effect that the device exists, is approved, produces a valid sample which can be reliably preserved, and is financially feasible. (J.A., pp. 175-178, 184-186, 193-194, and 196-197.) An affidavit was also filed with the trial court, wherein another expert stated that the device exists, is approved, and works. (J.A., pp. 202-204.)

All petitioner says about this is that no preserved breath sample could be material unless it "were proven that a practical means of preservation exists which permits a reliable retest." (Brief for the Petitioner, p. 26.) Petitioner then states, "The trial court below did not make such a finding. The California Court of Appeal refused to address the issue." (Brief for the Pet., p. 27.) It is true that the trial court made no

specific finding at all as to the device for preservation of a breath sample, but that is hardly a finding adverse to the device. As noted above, the trial record is replete with evidence, none of which is contradicted, that the device has been approved, works, and is a reliable means of preserving the breath sample for re-testing.

In sum, the uncontradicted testimony presented in the trial court established the existence, approval, and reliability of this device. The Court of Appeal expressly relied upon this evidence as the factual basis for its opinion. Thus, petitioner's unsupported assertions to the contrary are the opposite of the actual facts shown in this case. Since the factual premises of petitioner are untrue, the entire Brief for the Petitioner is irrelevant to this case. Given

these factual problems, this court should consider vacating its grant of certiorari as having been improvidently granted. This court has ruled that the writ of certiorari will be dismissed as having been improvidently granted where the "record does not adequately present the questions tendered in the petition." (Needelman v. United States (1960) 362 U.S. 600, at p. 600.) The writ of certiorari has been dismissed where the "actual facts simply do not present the issue for which certiorari was granted" (Conway v. California Youth Authority (1969) 396 U.S. 107, 109-110; see also Bostic v. United States (1971) 402 U.S. 547, 548.) At the very least, this court should decide the case based on the facts presented in this record, and not on petitioner's incorrect allegations of the facts.

II

ADDITIONAL FACTS NOT FOUND IN
THIS RECORD RENDER PETITIONER'S
FACTUAL ASSUMPTIONS UNTRUE

Apart from the facts as actually shown in the trial and appellate record of this case, there are many additional facts relating to the device at issue and the validity of the breath-testing machines themselves that are not shown in this record. Obviously, there is no space in this brief to exhaust these additional facts. But some of the more salient pieces of information will be presented, to show that there is far from a complete record presented in this case. Thus, any decision of this court will be of limited value, if any.

Petitioner makes two crucial assumptions which must be noted. First, petitioner assumes that breath testing

machines (if their records show no errors and a new test turns out correct) never make mistakes--i.e., are infallible. Of course, this would make preservation of a breath sample unnecessary. Second, petitioner assumes that there is no reliable method of preserving a breath sample for later retesting. In fact, both of these premises are false.

The first assumption underlying petitioner's brief is that breath-testing machines are completely accurate, and that all a different reading from retesting a breath sample could ever result in is a check of the breath-testing machine's logs (records of performance in the past) and a retest of the breath-testing machine with another sample. (Brief for the Pet., pp. 20-21, 26, and 28.) Petitioner concludes that

the breath-testing machine can always be rechecked even without a preserved sample, thereby eliminating the need for such preservation. (Brief for the Pet., pp. 26, 28.) Thus, petitioner assumes that if the records of the breath-testing machine show no errors, and a new test of another sample yields an accurate result, this establishes the unerring accuracy of the breath-testing machine. In other words, if the breath-testing machine produces a reading of .15, and a test of the preserved breath sample yields a reading of .04, the breath-testing machine is the correct one if the records of the machine show no problems and a new test produces an accurate result. In short, petitioner's unarticulated assumption is that breath machines which retest properly are always correct. Petitioner assumes that

if the breath-testing machine retests accurately, then whatever reading is obtained from the testing of a preserved sample must be wrong. 2/

Secondly, petitioner assumes that there is no reliable method of preservation. As noted above, the trial record shows without contradiction that the device at issue herein does exist, has been approved, and preserves a breath sample which can be reliably tested.

The problem with petitioner's assumptions is that they are untrue. In fact, breath testing machines are subject to errors which cannot be found by checking records and retesting the machine. Moreover, using the preserved sample is the only means of overcoming

² This assumption is hard to follow. In fact, the preserved sample would yield a blood alcohol reading by being tested on a breath-testing machine.

this problem. This information was not presented in the trial court, but it is critical to the true state of facts surrounding the accuracy and reliability of breath-testing machines.

A.

Radio Frequency Interference can cause undetectable errors in breath-testing machines.

The breath-testing machine involved in this case, along with every breath-testing machine in existence, can be adversely affected by Radio Frequency Interference, referred to as "RFI". (James H. Kaster "Breathalyzer Testing Possibilities for Error", 40 Bench and Bar of Minnesota, 11, 12 (Dec. 1983).

Radio frequency interference is defined, in the McGraw-Hill Dictionary of Scientific and Technical Terms (2nd Ed 1978, as interference from sources of

energy outside a system or systems.

Radio frequency interference has been around as long as electronic instruments themselves and on a daily basis radio waves interfere with the proper operation of all types of electronic instruments, causing "snow" or lines on television sets, static on radios, interrupted CB transmissions; malfunctioning of all types of appliances such as microwave ovens, mix masters, toaster ovens, and phone conversations. (James Feldman and Harvey Cohen "The Questionable Accuracy of the Breathalyzer Test" Trial Magazine, vol. 19, No. 6, June, 1983, p. 54.) It is clear most electronic equipment is subject to radio frequency interference. (Feldman, supra, p. 1.) Until 1982, this scientific principle of interfering waves from radio transmissions adversely affecting breath-

testing machines, had never been considered.

In 1982, the Washington Metropolitan Police Department in the District of Columbia along with other law enforcement agencies complained to the United States Government that radio waves from police walkie talkies were interfering with the proper operation of the breath-testing machines. (U.S. Department of Transportation Law Enforcement Standards Laboratory, National Engineering Laboratory, National Bureau of Standards, NHTSA Technical Report, DOT HS 806-400 "Limited Electromagnetic Interference testing of Evidential Breath Testers", hereinafter cited as "National Bureau of Standards Report". See also, Reese I. Joye, Jr. "Drunk Driving", Trial Magazine, vol. 19, No. 6, June, 1983, pp. 62-66.)

The National Bureau of Standards in Boulder, Colorado was requested to investigate the operation of all breath-testing machines sold and utilized in the United States to ascertain if radio frequency interference was producing false readings as the police agencies had complained about to the U.S. Government. (National Bureau of Standards Report.) After extensive testing of twenty-five machines, a report was released in May 1983 by the U.S. Department of Transportation National Bureau of Standards Report. This report was made public June 1, 1983. (News release Department of Transportation, June 1, 1983.) Only sixteen of the machines were able to withstand the tests. Of those machines, nine had false readings at various radio strengths caused by hand-held walkie talkies which were held

within three feet of the breath-testing machine. In other words, a person could be convicted because of a reading on the breath-testing machine used in this case, 3/ when the arrestee was not under the influence and when the actual blood alcohol level was less than .10% even though the reading was over a .10% blood alcohol. 4/

3 CMI, Inc. is the manufacturer of the breath-testing instruments utilized by the respondents in this case. CMI, Inc. manufactures the omnicron intoxilizers 4011, 4011A, 4011AS, 4011AW.

4 The facts cited are, as noted, not in the trial record of this case. It is Amicus Curiae's intent to state these facts to the court precisely to show the lack of a complete record on these technological issues. Amicus is not requesting a decision on these facts; quite the contrary, Amicus suggests that any decision should be sharply limited in light of these additional facts not presented in these cases or that the writ of certiorari be dismissed as having been improvidently granted. In any event, judicial notice of these facts can be taken under Rule 201, subdivision (b), Federal Rules of Evidence, as facts capable of accurate and ready determination

The Ohio State Highway Patrol, in a separate and totally unrelated experiment to that of the National Bureau of Standards, came to the identical result and conclusion that the federal government was to reach six months later. The Ohio State Highway Patrol found that the 4011 Intoxilizer was ". . .affected by RF . . ." and that ". . .the distortion could be caused to result from the intoxilizer by RF that a trained operator would not be able to observe." "The RF was observed to affect the reading in many different ways. It was observed to produce a consistent steady climb to .450 on one instrument. In other instruments, it produced a negative reaction and jumped to extremes without any steady

by resort to sources whose accuracy cannot reasonably be questioned. The citations to those sources is found throughout this brief.

climb." (Ohio State Highway report for Cap. J. W. Rohal, June 7, 1982, E. Helton, June 14, 1982.

In one experiment, a police walkie talkie was held within three feet of the intoxilizer and a blood alcohol solution of .105 produced a reading of .450 with radio frequency interference. Another walkie talkie, up to 21 feet away in an adjoining room with the door shut, caused an affect on a 4011 intoxilizer. (Capt. C. J. Hunter, Ohio State Highway Patrol memo, Dec. 1, 1982.) -

The Smith and Wesson Company which manufactures and sells breath-testing machines called Breathalyzer models 900 and 900A, in a totally independent study to the National Bureau of Standards and the Ohio State Highway Patrol, found radio frequency interference in their machines in 1981. The investigation by

Smith and Wesson arose due to complaints of erroneous breath readings in New Jersey and Florida. Smith and Wesson in extensive analysis of radio frequency interference and its affect upon models 900 and 900A culminated in the Smith and Wesson Advisory sent out to customers on September 10, 1982. The Advisory advised customers that their ". . .continuing investigation now suggests that this early series of breath testing instruments may be affected in an unpredictable manner by various frequencies and power levels." (Smith and Wesson Customer Advisory, Sept. 10, 1982; see also, Erwin, Drunk Driving, Feb. 1984 supplement 22-1 to 22-41.5(4).)

The police department in West Point Pennsylvania, conducted a similar experiment on an breath-testing machine called the Model 1000 SA Alco-Analyzer Gas

Chromatograph using a hand-held police walkie talkie. Sergeant Robert A. Freed found that the Alco-Analyzer was subject to radio frequency interference at various frequencies at various times and distances. Sergeant Freed reported erroneous readings at 9.1 meters (30 feet) outdoors away from the Alco-Analyzer. (Robert A. Freed "Radio Frequency Interference with Model 1000SA Alco-Analyzer Gas Chromotograph" 28 Journal of Forensic Services, 985, 986 (Oct. 1983).)

New Jersey has also conducted tests on radio frequency interference independent of all previously mentioned tests, and determined based on the experiments conducted by Sergeant First Class Kenneth Neubauer, the officer in charge of the New Jersey State Police Breath Testing unit, that radio frequency interference affected nearly all the breathalyzer

machines under his supervision. The tests were performed at the Mammoth Beach Marine Headquarters and the tests resulted "in obvious deflection of the needle and interference with the reliability of the machine by radio frequency waves". Further, Norman Coultir, New Jersey State Radio Frequency Coordinator Analyst authored a report for the State of New Jersey showing the susceptibility of the breathalyzer to radio frequency interference. (Drinking/Driving Law Letter, vol. 2, no. 15, July 22, 1983, p. 2-4.)

The recommendation of all five studies, as well as the studies from the State of Minnesota, is to turn off the walkie-talkies and leave them outside before testing arrestees who are suspected of driving under the influence of alcohol.

In California, local police departments (such as the Los Angeles Police Department) and the California Highway Patrol require law enforcement officers to be equipped with walkie-talkies for immediate use in emergencies and communication with the police station and other law enforcement personnel. Law enforcement personnel are required to turn their walkie talkies in an "on" or transmission mode when leaving their law enforcement vehicles so that they can be made aware of any emergencies. Each law enforcement vehicle has an extender unit so that the walkie talkie can transmit at great distances. (Reporter's Transcript of oral proceedings in People v. Charles Henry Allen, case number V-165205, and People v. Errol Stanley Leslie, case number V-165530, in a hearing conducted in Division 75 of the Los

Angeles Municipal Court, on November 28, 1983; pp. 15, 32.) Law enforcement officers at the time of administering breath tests to arrestees suspected of driving under the influence are, of necessity, standing only two or three feet away at the time of administering the breath test. Hence, at the time the breath tests were administered to respondents, radio frequency interference could have affected the breath result.

As pointed out by the National Bureau of Standards, radio frequency interference affected some machines differently at different times and it is impossible to recreate the exact factors which could have caused the results of a malfunction in any one particular case.

The insidious nature of radio frequency interference cannot be readily recreated without showing exactly what

radio wave at exactly what strength interfered with the machine in question. Further, the radio wave is picked up by one of the numerous wires inside the intoxilizer and which is interconnected with one of three circuit boards within the machines. The wires serve as antenna for the radio wave which causes the electronic circuit board to cause an erroneous reading.

As a result of vigorous investigation of radio frequency interference, and the effect of radio frequency interference upon the breath-testing machines authorized by individual states, several states have established protocols to deal with radio frequency interference (Minnesota Protocol for RFI Testin, Michael A. Kelly, John A. Tarantin- "Radio Frequency Interference and the Breathalyzer: A Case Analysis"; New

Jersey State Police Radio Frequency Interference Testing Procedure for Breathalyzers) while other states or part of states have banned breath-testing machines until an effective method for combating the effect of radio frequency interference on the breath-testing machines could be developed (State v. Squires, appeal No. 82-363-AC 11th Circuit Court for Dade County, Florida, Jan 11, 1983; 5/ Durand v. City of Woonsocket et al. No. 82-4808, Dec. 15, 1982; (Superior Court of Providence County, Rhode Island); Romano et al v. Kimmelman et al, Docket No. L-024563-83E

 5 Amicus is not citing decisions of trial courts and other unpublished opinions as authority in support of any position. The point again is merely to illustrate the lack of record in this case. In any event, these sorts of decisions, while not controlling, may be given weight by this court. (See, e.g., King v. Order of Travelers (1948) 333 U.S. 153, 160-161; 68 S.Ct. 488; 92 L.Ed. 608.)

Superior Court of New Jersey April 27, 1983; State v. Benjamin Lopat et al (Drunk Driving Law Letter 2-3-41 vol. 2, no. 5, 7-22-83) Municipal Court of Highlands, New Jersey.) Judicial officers in seven states have concluded that, due to radio frequency interference, breath-testing machines give false readings which can lead to the conviction of innocent persons. (Richard A. Shaffer "Electronic Interference Rises, Causing Havoc in Many Fields "The Wall Street Journal, November 18, 1983, p. 31.)

The above discussion of radio frequency interference is not intended as an exhaustive discussion of reasons why breath-testing machines might produce incorrect readings of blood alcohol levels. A few of those problems are discussed in the footnote that

follows. 6/

 6 Electronic surges of power, i.e., unusual amounts of power above 130 volts or sudden diminution of power below 80 volts can cause an erroneous reading on the machine, independent of the radio interference of radio frequency interference or in conjunction with the radio frequency interference. (Orange County Trial Lawyer's Ass. "The Ninth Annual Drunk Driving Seminar" Syllabus 1982, p. 25, Winning Strategy for Drunk Driving Cases, supra, p. 143-146.)

An assumption made is that all persons have a normal body temperature of 98.6 degrees Fahrenheit. If the person has a temperature and is ill from a cold, flu, influenza, or any disease which could elevate the temperature, then the readings on the machine could be erroneous. A 1.8 degree Fahrenheit (1 degree Centigrade) variation in normal body temperature (98.6 degrees Fahrenheit) will produce a 7% error in the test favorable to the prosecution's position. (T.P. Casselman, "Body Temperature and the Breathalyzer Boobytrap", Michigan Bar Journal (Sept., 1982, p. 721.)

Breath-testing machines operate on the premise that there exists in every case of every person who blows into the machine a 1 to 2100 ratio between alcohol in the breath to the amount of alcohol in the blood; that is to say that for every one part of alcohol in aveolor (deep lung) air, there are 2100 parts of alcohol in the blood.

B.

The Indium Kit is an accurate method of preserving a breath sample which can be tested so as to avoid radio frequency interference.

The indium crimper kit has been cer-

The leading researcher in America on this subject states the true average is 1 to 2280 and that the range lies between 1900 to 2400 to 1 and that 14% of the time the breath-testing machines overestimate the blood alcohol level of the arrestees. Thus out of every 100 arrests, 14 persons have blood alcohol rates reflected by breath-testing machines that are lower than that shown on the readout of the breath-testing machine. Hence 14% of all persons may be convicted falsely based on the error of the 2100 to 1 ratio alone. (Erwin, Drunk Driving, Feb., 1984 Supplement, 33A-6.1, 33A.01.)

The intoxilizer absorbs infrared energy at 3.39 micron wavelengths by burning ethyl alcohol. Unfortunately, many substances can be found at 3.39 microns other than alcohol. Acetone is found in the human mouth and it reads out as ethyl alcohol. Diabetics have more acetone in their mouth than non-diabetics and one in 50 is a diabetic in the United States. (Winning Strategies in Drunk Driving Cases, 1984 Continuing Education Seminar; WC, p. 174-175.)

tified by the California Department of Health for use in the retention of breath samples, pursuant to Title 17, section 1221.3 of the California Administrative Code. (See J.A., p. 247.) The crimper kit is currently used in San Bernardino County by the San Bernardino County Sheriff for the retention of breath samples of arrestees for later reanalysis. (Reporter's Transcript of oral proceedings in People v. Tomas Lopez, et al., case number V-149446, in a hearing conducted in Division 71 of the Los Angeles Municipal Court on June 15, 1983; testimony of manufacturer and co-inventor of indium crimper kit, Mr. M.R. Forrester, p. 8:11-12, p. 56.) California is one of seven states which currently use the crimper device for retained breath samples. Other states use other devices to retain breath sam-

ples for reanalysis. Colorado uses the calcium sulfate collection agent or silica gel; Alaska and new Hampshire use the perchlorate system; and Arizona and Delaware use the silica gel method exclusively. (Id., p. 10.)

The indium crimper kit can be affixed to any breath-testing machine or can be used alone without attaching to any other device. (Id., p. 19.) The indium crimper kit does not require the unit to be plugged into an electrical outlet, but can, after being heated, be used independent of any other breath-testing machine or electrical outlet. (People v. Lopez supra, p. 33-34.) Thus the indium crimper device is the only unit which can collect a retained breath sample for reanalysis that is not subject to radio frequency interference. (People v. Lopez, supra, p. 33-34.)

The indium crimper kit consists of a wooden box which houses a handle, a heat thermostat element and two aluminum jaws which move when the handle is activate to form a vise. The device is assembled in the field by mounting the handle to the wooden box and removing the accessories, attaching a waste bag, a chemical value, and a power cord. Contained within the sealed wooden box is a check list of what the operator is to do. Also inside the wooden box is a filter, a T-Type mouth piece, a photograph of how to assemble the kit; and an indium template (which is an aluminum bracket which holds a piece of indium tubing).

The operator mounts the filter at one end and the valve and the T-Type mouthpiece at the other and affixes the jaws of the crimper. The wooden box is

then closed and the electrical connector is mounted and plugged in either to house or automobile current depending on the choice of the operator. The unit is operating at a temperature between 47 and 54 degrees and when the light comes on, the unit is ready for operation. The unit can then be unplugged from the current and operate independently. The operator can also check the thermometer inside the wooden box to make sure that it is within operating range. The waste bag is a visible means for the operator to know that the arrestee is blowing into the T-Type tube and that he has blown long enough to obtain deep lung air. A whistle blows at this point and the operator squeezes the handle of the crimper thus sealing into the template the air of the arrestee. The crimper device crushes both ends of the template

thus sealing in the air of the arrestee and sealing out all outside air. This retained air sample can be used by the arrestee or by the state since each crimp can produce three retained air samples individually separate one from the other. (People v. Lopez, supra, pp. 11-14.) These samples can be retained for retesting for as long as two years and still hold their integrity. In California administrative rules provide that the sample may only be relied upon if tested within 14 days. (People v. Lopez, supra, p. 14.) The 14-day rule is an administrative decision of the Department of Health, even though the sample can be retained scientifically for longer periods of time. (People v. Lopez, supra, p. 14.)

All existing breath-testing machines are capable of being modified so that

the indium crimper kit can be attached to existing devices and with the use of T-tubing the arrestee still need only blow twice and the air sample would go both into the crimper device and into the normal chambers of the breath-testing machine. (People v. Lopez, supra, pp. 11-14.) The indium crimper device can be built in at the factor for a little as \$50. (People v. Lopez, supra, pp. 16-17.)

The cost of the crimper device is \$300 and can be used millions of times; the cost of a box of indium templates would be \$13.90 and \$12.90 per box if purchased in quantity. (People v. Lopez, supra, p. 17.) The retesting of the retained air sample would cost \$2 to \$3. (People v. Lopez, supra, p. 14.) In sum, this device works, is reliable, and is the only means of securing a breath

sample which can be tested on a breath-testing machine insulated from the effects of radio frequency interference.

III

THE ENACTMENT OF A NEW STATUTE
INSURES THE USE OF BREATH-
TESTING MACHINES IN CALIFORNIA

Petitioner notes in passing a new statute, California Vehicle Code section 13353.5. (Brief for the Pet., p. 20, fn. 13; p. 22, fn. 15.) This statute provides that if a suspect in a drunk driving case takes a breath test, the police officers are required to advise the suspect that the breath-testing machine cannot preserve a sample of that breath, and that the suspect may choose a blood or urine test, or a waiver of the right to a preserve test will occur. 7/ This statute became

7 A full text of Vehicle Code § 13353.5 follows:

"(a) In addition to the requirements of Section 13353, a person who chooses to submit to a breath test shall be advised

effective on September 15, 1983. (Cal. Stats. 1983, Ch. 841; see No. 8 West's -----

before or after the tests that the breath-testing equipment does not retain any sample of the breath and that no breath sample will be available after the test which could be analyzed later by the person or any other person.

"(b) The person shall also be advised that because no breath sample is retained, the person will be given an opportunity to provide a blood or urine sample that will be retained at no cost to the person so that there will be something retained that may be subsequently analyzed for the alcoholic content of the person's blood. If the person completes a breath test and wishes to provide a blood or urine sample to be retained, the sample shall be collected and retained in the same manner as if the person had chosen a blood or urine test initially.

"(c) The person shall also be advised that the blood or urine sample may be tested by either party in any criminal prosecution. The failure of either party to perform this test shall place no duty upon the opposing party to perform the test nor affect the admissibility of any other evidence of the alcoholic content of the blood of the person arrested."

Cal. Legis. Service, pp. 4459-4461.)

What petitioner fails to note is the impact this statute has on this case. Apparently, petitioner's fear is that under the decision of the California Court of Appeal in this case the use of breath testing machines in California is no longer viable. The factual assumptions underlying this position are in error, as discussed above. But in any event, the issues presented by petitioner can no longer arise in California because of the new statute.

Under the statute, the use of a breath-testing machine will result in either a second, preserved test, or a waiver of any such preservation. In either event, no impairment to the use of the breath-testing machine arises. Thus, the enactment of this statute leaves no important issue for this court

leaves no important issue for this court to resolve.

An intervening change in the law justifies the dismissal of the writ of certiorari as having been improvidently granted where that change "bars the ultimate question presented in this case from again arising in that State." (Rice v. Sioux City Memorial Park Cemetery (1955) 349 U.S. 70, 73.)

CONCLUSION

The facts in this case are simply not what the petitioner has represented them to be. The facts as they truly exist do not permit a resolution of the Question Presented as framed by petitioner. Moreover, there are additional facts not presented by the record provided to this court. Thus, factually, this court's decision even on the record provided will have limited application,

in any, to the legal issues raised by the technology involved herein. Lastly, the passage of new legislation in California has rendered the issues in this case of no further importance since the use of the breath-testing machines has now been preserved.

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EXHIBIT "A"

AD HOC COMMITTEE ON BREATH TESTING

ADVISORY COMMITTEE ON ALCOHOL
DETERMINATION

Notes of Meeting: August 31, 1982

California State Department
of Health Services
Laboratory Services Branch
2151 Berkeley Way
Berkeley, California 94704

Departmental Representatives Present

Daniel R. Morales, Ph.D.
Chief, Clinical Chemistry
Laboratory Section

Ad Hoc Committee Members Present

Alfred A. Biasotti
(Representing State Department
of Justice)
Criminalist, Bureau of
Forensic Services
State Department of Justice

Richard E. Erwin
(Representing California Public
Defenders' Association)
Public Defender, Ventura County

Kathryn J. Holmes
(Representing California Association
of Criminalists)
Supervising Criminalist
Office of Sheriff-Coroner,
Contra Costa County

William C. Jordan
(Representing California Association
of Bioanalysts)
Presbyterian Intercommunity Hospital
Laboratory, Whittier, Ca

Charles R. B. Kirk
Deputy Attorney General
State Department of Justice

John D. Madall
(Representing Los Angeles
Police Department)
Commanding Officer, Scientific
Investigation Division
Los Angeles Police Department

Halle L. Weingarten
(Representing California Association
of Toxicologists)
Laboratory of Criminalistics,
Santa Clara County

Other Participant

Maxine Hutchin, Alameda County Sheriff
Department Crime Laboratory

[Page 28]

Therefore, the Ad Hoc Committee recommended to the Advisory Committee on Alcohol Determination the deletion of remote collection and later analysis from the regulations in Title 17.

The Ad Hoc Committee next considered a series of other issues related to the capture of breath alcohol samples for later analysis. These issues are summarized in the following statements:

1. The concept of remote collection of samples has been confused with the concept of breath sample retention for referee analysis.

2. There is no scientific need to retain a breath sample for referee analysis.

3. There is no reliable and practical way to retain a breath sample for referee analysis inasmuch as there is no breath sample capturing device which can meet the performance standards with regard to: air blank, calibration with a standard solution; quality control with a reference sample.

4. If regulations relative to retention of breath samples for referee analysis are needed for any reason, then new regulations should be written specifically for this application, including such performance standards as the number of replicates, storage,

stability, etc.

As was covered in the foregoing deliberations of the Ad Hoc Committee, remote collection of breath alcohol samples for later analysis was placed into the regulations to answer a specific problem which was postulated at one time; namely, the practical problem which could result from an officer's making an arrest at a location which was remote from an installed breath testing instrument. All the conditions set forth in the regulations for remote

[Page 30]

section and later analysis were developed for this specific application and not for another application, such as referee analysis. Referee analysis is analysis by the defendant of remaining sample, when sufficient sample remains [Section 1219.1(g), Section 1219.(g)(2), Section 1219.2(c), and Section 1219.2(c)(1)].

MAR 26 1984

ALEXANDER L. STEVAS.
CLERK

No. 83-305

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1983

PEOPLE OF THE STATE OF CALIFORNIA,

Petitioner,

v.

ALBERT WALTER TROMBETTA, et al.,

Respondents.

On Writ of Certiorari
To the California Court of Appeal,
First Appellate District

BRIEF OF
THE STATE PUBLIC DEFENDER OF CALIFORNIA
AS AMICUS CURIAE IN SUPPORT OF RESPONDENTS

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No. 83-305

IN THE
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PEOPLE OF THE STATE OF CALIFORNIA <i>Petitioner,</i> v. ALBERT WALTER TROMBETTA, et al., <i>Respondents.</i>
--

On Writ of Certiorari
To the California Court of Appeal,
First Appellate District

BRIEF OF
THE STATE PUBLIC DEFENDER OF CALIFORNIA
AS AMICUS CURIAE IN SUPPORT OF RESPONDENTS

INTEREST OF AMICUS CURIAE AND CONSENT

The State Public Defender of California is an agency of California state government which is charged with the representation on appeal of indigent criminal defendants. The outcome of the instant case will have a substantial impact on the rights of persons represented by this office, as well as the public as a whole, to due process of law and to a fair trial. Accordingly, the State Public Defender of California is filing this brief amicus curiae in support of respondents herein.

This brief is filed pursuant to Rule 36 of the Rules of the Supreme Court of the United States. Consent to the filing of the brief has been given by counsel for all parties to the action. Written consent forms, signed by counsel for each of the parties, accompany this brief.

SUMMARY OF ARGUMENT

This case concerns whether the state has a duty to preserve breath samples it collects for later analysis and testing by the defendant in a criminal prosecution for driving under the influence of alcohol. Petitioner below took the position that the state need not take any steps to afford the defendant access to this critical evidence of blood alcohol concentration which it demands from the defendant. Now, on the merits, petitioner broadens substantially the nature of the remedy sought and asks this Court to rule that federal due process has never included a duty to preserve evidence.

A decisive intervening change in California statutory law, however, has made it unnecessary for this Court to reach any of these issues. Before the instant case was ever applied to anyone, the California Legislature wisely enacted California Vehicle Code §13353.5, requiring that a suspect arrested for driving under the influence must be informed that any breath sample collected will not be preserved, and that he or she may either waive this infirmity or, alternatively, choose a blood or urine test. This critical intervening statutory change vitiates the impact of any decision this Court may render in the case at bar. Amicus therefore first argues that this Court

should dismiss the writ of certiorari as improvidently granted since the effect of the change in statute is now in proper focus.

Second, amicus argues that careful consideration of the underpinnings of the decision below demonstrates it rests on adequate state grounds. Intervening decisional law further clarifies that California's approach to the duty to preserve evidence has, in effect and practice, become a California doctrine of independent existence. For this reason also, the writ of certiorari should be dismissed as improvidently granted.

Should this Court reach the merits, amicus contends in Argument III that the decision in *Brady v. Maryland*, 373 U.S. 83 (1963) made it clear that federal due process does require the state to preserve material evidence in its possession. Because evidence of a suspect's blood alcohol concentration is manifestly material in a prosecution for driving under the influence of alcohol, the duty to preserve encompasses the preservation of breath samples the state forces a person to produce.

Finally, amicus briefly concludes that whether the behavior involved in this case is characterized as "gathering" or "preserving" evidence, the limited nature and scope of the case at bar require this Court to construe federal due process to allow the defendant access to this undeniably crucial evidence.

SUMMARY OF CASE

An individual arrested for driving under the influence of alcohol is required to submit to a blood, breath or

urine test. Failure to submit results in the loss of one's driver's license and the use of the refusal to establish consciousness of guilt at any subsequent trial on the matter. California Vehicle Code §13353; see *People v. Suduth*, 65 Cal.2d 543, 421 P.2d 401, 55 Cal.Rptr. 393 (1966).¹

Respondents, like most individuals in California similarly arrested, submitted to a breath test after their arrest for driving under the influence of alcohol. They were tested on an Omicron Intoxilyzer. Each respondent's breath registered an alcohol level of at least 0.10.² None of the breath samples was preserved for later testing by the respondents. J.A. 153-54, 158.

The Intoxilyzer, by definition and manufacturer's description, *collects* breath samples blown by the subject into its chamber. J.A. 155, 178, 244. An infrared light is used to test the alcohol level and the results of the two required breath samples are indicated on a printout card. J.A. 155.

¹ A suspect has no constitutional right to refuse to give a breath sample. *Ibid.*; see *Schmerber v. California*, 384 U.S. 757 (1966).

² Former California Vehicle Code §23102(a), under which respondents were prosecuted, proscribed misdemeanor driving under the influence of intoxicating liquor. Former California Vehicle Code §23126(a)(3), created a presumption of impairment due to alcohol where the accused's blood alcohol concentration (BAC) was 0.10 or greater.

On January 1, 1982, California Vehicle Code §23152(b) became effective, making it unlawful for any person who has 0.10 percent or more, by weight, of alcohol in his or her blood to drive a vehicle. It is no longer necessary to prove that the defendant was in fact under the influence; the state need only establish beyond a reasonable doubt that at the time of driving, the defendant's BAC was or exceeded 0.10 percent. *Burg v. Municipal Court*, 35 Cal.3d 257, 673 P.2d 732, 198 Cal.Rptr. 145 (1983).

Since 1973, the California State Department of Health has given official approval to a breath collection device known as the Intoximeter Field Crimper-Indium Tube Encapsulation Kit (hereinafter referred to as the "Kit"). J.A. 175-76. The Kit does not test but instead collects breath. The subject blows into an indium tube which captures the breath sample for later analysis and is capable of holding the breath sample in three separate compartments. J.A. 156. These compartments can then be placed in one of two state approved gas chromatographs for BAC testing. J.A. 156, 186, 242-44. Breath samples stored in the Kit can be tested accurately for up to 90 days and even a year. J.A. 184-186. The Kit itself is reusable and costs \$200.00; the indium tubes for each subject cost about \$14.00. J.A. 179.

It was stipulated between the parties that the Kit was "on the market and available to the State if it were required to use [it]" J.A. 167, 182-83. Despite the availability of the Kit, officers in the instant cases did not use it. They instead used an Intoxilyzer which they operated in such a fashion as to release the breath sample after obtaining an analysis of the breath's alcohol concentration.

ARGUMENT

I.

THE WRIT OF CERTIORARI SHOULD BE DISMISSED BECAUSE AN INTERVENING CHANGE IN STATUTORY LAW HAS OBIATED THE IMPACT OF ANY DECISION THIS COURT MIGHT RENDER

None of the respondents herein was told that a breath

sample would be saved. J.A. 154. At the time these cases arose, there was no statutory requirement that persons arrested for driving under the influence be so informed. However, on September 15, 1983, four months before certiorari was granted, the California Legislature enacted new California Vehicle Code §13353.5³ (hereinafter cited as §13353.5), which provides as follows:⁴

(a) In addition to the requirements of Section 13353, a person who chooses to submit to a breath test shall be advised before or after the test that the breath-testing equipment does not retain any sample of the breath and that no breath sample will be available after the test which could be analyzed later by the person or any other person.

(b) The person shall also be advised that, because no breath sample is retained, the person will be given an opportunity to provide a blood or urine sample that will be retained at no cost to the person so that there will be something retained that may be subsequently analyzed for the alcoholic content of the person's blood. If the person completes a breath test and wishes to provide a blood or urine sample to be retained, the sample shall be collected and retained in the same manner as if the person had chosen a blood or urine test initially.

³ Stats. 1983, chap. 841, p. —, §1, urgency.

⁴ Section 4 of Stats. 1983, chap. 841, p. —, provides in pertinent part: "In order to provide a constitutional procedure for administering the breath test in light of the decision of the court of appeal in *People v. Trombetta* (1983), 142 Cal. App.3d 138, it is necessary that this act take effect immediately."

(c) The person shall also be advised that the blood or urine sample may be tested by either party in any criminal prosecution. The failure of either party to perform this test shall place no duty upon the opposing party to perform the test nor affect the admissibility of any other evidence of the alcoholic content of the blood of the person arrested.

This section was enacted expressly to deal with *Trombetta's* holding that the Omicron Intoxilyzer's failure to preserve the breath sample or its equivalent violated due process. See, *supra*, n. 4. Section 13353.5 operates to save the use of the Intoxilyzer, and arguably of any other breath-testing device, by informing subjects of its constitutional infirmities so that they may make an *informed* choice whether to waive their constitutional right to preservation of a breath sample.

The enactment of §13353.5 resolves the "*Trombetta*" issue for all drunk driving cases arising after September 15, 1983. Obviously, if a suspect is fully informed pursuant to the statute's directive, and then chooses to waive his or her due process right to a preserved breath sample, the subsequent use of the Intoxilyzer is permissible. On the other hand, should the arrestee choose the option of preserving the evidence of the BAC, he or she may submit to a blood or urine test. The choice in either event is now properly in the hands of the accused.

Most importantly, the enactment of §13353.5 means that the *only* persons who will be affected by any decision on the merits this Court renders herein will be the respondents.⁵

⁵ The decision in *Trombetta* expressly applied only to respondents herein and to those "tests performed after this decision has

It is well settled that where a change in the law has occurred prior to this Court's grant of a writ of certiorari, and, had it been fully aware of the implications of such a change the Court would not have granted certiorari, the writ of certiorari should be dismissed as improvidently granted. *Rice v. Sioux City Memorial Park Cemetery, Inc.*, 349 U.S. 70 (1954); *Piccirillo v. New York*, 400 U.S. 548 (1971); *Cook v. Hudson*, 429 U.S. 165 (1976); see, Annot. 30 L.Ed.2d 829, 854 (1972).

In the leading case of *Rice v. Sioux City Memorial Park Cemetery, Inc.*, *supra*, this Court considered the effect of an intervening change in the law upon the grant of certiorari. There, the plaintiff had sued in Iowa state court for mental suffering from the defendant's refusal to bury her husband. Plaintiff relied upon a clause in the contract which she alleged was void under federal and state constitutions. The case was dismissed by the state court and the dismissal affirmed by the Iowa Supreme Court. This Court granted certiorari, and affirmed the judgment.

On petition for rehearing, however, this Court reviewed its original decision to grant certiorari in light of an intervening Iowa statute and dismissed the writ of certiorari as improvidently granted. The Court noted

become final". J.A. 160. In California, a decision is not final until the remittitur issues from the reviewing court. See Cal. R. Ct. 25(a). The court of appeal granted an indefinite stay of the issuance of the remittitur on August 31, 1983. See, Brief for Petitioner at 2. Section 13353.5 became effective September 15, 1983. Therefore, the only persons who would be affected by a decision on the merits in the instant cases are the respondents, assuming they are included in any relief this Court might issue.

that although the statute was in existence at the time the case first came to it, the effect of the statute on the issues before it was obscured by certain constitutional issues "for which our interest was enlisted". (*Id.*, at 73.)

This Iowa statute bars the ultimate question presented in this case from again arising in that State. In light of this fact and the standards governing the exercise of our discretionary power of review upon writ of certiorari, we have considered anew whether this case is one in which "there are special and important reasons" for granting the writ of certiorari as required by Supreme Court Rule 10.

Ibid., (emphasis added).

The Court's interpretation in *Rice* of the "special and important reasons" requirement is particularly apposite to the instant case. It emphasized that although a "federal question raised by a petitioner may be 'of substance' in the sense that, abstractly considered, it may present an intellectually interesting and solid problem" this Court is not a forum for the pursuit of scholarly interests. *Id.*, at 74. "Nor does it sit for the benefit of the particular litigants." *Ibid.*, (citations omitted).

"Special and important reasons" imply a reach to a problem beyond the academic or the episodic. This is especially true where the issues involved reach constitutional dimensions, for then there comes into play regard for the Court's duty to avoid decision of constitutional issues unless avoidance becomes evasion.

Ibid. ⁶

⁶ Similarly, in *Cook v. Hudson*, *supra*, certiorari was granted to consider whether under the First and Fourteenth Amendments,

Instructive in the case at bar is the concurring opinion by Mr. Justice Harlan in *Triangle Improvement Council v. Ritchie*, 402 U.S. 497 (1971), where this Court per curiam, dismissed the writ of certiorari as improvidently granted. Four events since the granting of certiorari rendered the case "wholly inappropriate for review", including the passage of a new statute that drastically altered the potential impact of any decision the Court might reach in the case. *Id.*, at 498-99. For this reason, Mr. Justice Harlan found the case to be "a classic instance of a situation where the exercise of our powers of review would be of no significant continuing national import". *Id.*, at 499; see also, *Piccirillo v. New York*, *supra*.

Like the statutes in the foregoing cases, §13353.5 eviscerates the potential impact of any decision this Court might render herein. The statute was enacted after these proceedings commenced and, as in *Rice*, *supra*, 349 U.S. at 73, and *Cook*, *supra*, 429 U.S. at 165, was in existence at the time the Court granted the writ of certiorari. Although brief mention was made of the existence of the statute in respondents' brief in opposition to the petition, no authority was cited, nor was argument or legal theory tendered as to the impact of the statute on the exercise of this Court's discretion under Supreme Court Rule 17. Brief in Opposition 21-22; see *Rice v.*

a Mississippi public school board may fire its teachers for sending their children to a private racially segregated school. Subsequent to the initiation of litigation, the Mississippi legislature enacted a statute, apparently in response to *Cook*, which prohibited school boards from denying employment to a person on the grounds that any eligible child of such a person did not attend the public school system. 429 U.S. at 166-167. This key intervening development as well as a subsequent case considered at oral argument, satisfied this Court that the writ should be dismissed. *Id.*, at 166.

Sioux City Cemetery, supra, 349 U.S. at 75. Notably, only passing reference to the statute is made in petitioner's brief on the merits. Brief for Petitioner at 20, n. 13; 21, n. 15.

It is significant that the existence of this sound reason to decline certiorari may not have originally been "seen in proper focus" because it was "blanketed" by the constitutional issues raised by the petition for writ of certiorari. *Rice, supra*, 349 U.S. at 73. Moreover, the effect of this critical change in the law has been further obscured by petitioner's assertion of a "parade of horrors" sure to result should this Court not act. See e.g., Petition for Writ of Certiorari 12-15, 27-28. In short, the importance of the new statute "was not put in identifying perspective" by either party. *Rice, supra*, 349 U.S. at 75.

Finally, as an additional factor weighing strongly in favor of the dismissal of the writ of certiorari, amicus notes that petitioner in its brief on the merits, now seeks to broaden substantially the nature of the remedy it originally sought in the petition for writ of certiorari. See, *Triangle Improvement Council v. Ritchie, supra*, 402 U.S. at 499, 501-02 (Harlan, J., concurring). Thus, the original petition declared that the questions presented were 1) whether "*the duty to preserve evidence under federal due process*" forbids the use of machines like the Intoxilyzer; and 2) whether "*the duty to preserve evidence under federal due process*" compels law enforcement to gather evidence. Petition for Writ of Certiorari, "Questions Presented" (emphasis added). Now, on the merits and for the very first time in the history of these proceedings, petitioner primarily argues that there *is* no duty to preserve evidence under federal due process and that this Court should so hold. Brief for Petitioner at 8-21. As Mr. Justice Harlan observed, such a change of posture is troublesome and renders adjudication on

the merits an improvident expenditure of the energies of the Court. *Id.*, at 501-02.

In sum, it is now clear that because of this intervening statutory addition, the most persons affected by this Court's ruling will be the handful of respondents appearing in these cases. The exercise of "sound judicial discretion" which governs the exercise of this Court's powers under Supreme Court Rule 17 compels that the writ of certiorari be dismissed as improvidently granted. *Rice v. Sioux City Cemetery, supra*, 349 U.S. 77; see *Morris v. Weinberger*, 410 U.S. 422 (1973).

II

THE WRIT OF CERTIORARI SHOULD BE DISMISSED BECAUSE THE DECISION BELOW RESTS ON INDEPENDENT STATE GROUNDS

The leading California case on the duty of law enforcement officials to preserve evidence is *People v. Hitch*, 12 Cal.3d 641, 527 P.2d 361, 117 Cal.Rptr. 9 (1974). *Hitch* held that the investigative agency involved in administering a breathalyzer test for BAC has a duty to preserve and disclose the test ampoule collected. The court below relied heavily on *Hitch*, and petitioner's brief on the merits constitutes a frontal attack on *Hitch*. Petitioner complains that *Hitch* too broadly defines the circumstances under which evidence will be found to be (1) favorable to the defendant and (2) material on the issue of guilt. Brief for Petitioner at 23-26. Assuming, arguendo, that *Hitch* defines these concepts more broadly than does federal case law, an analysis of California authority shows that *Hitch* does so as a matter of

state law, not because of a misperception of federal constitutional requirements.

In *Hitch* the California Supreme Court took as its point of departure this Court's decisions in *Giglio v. United States*, 405 U.S. 150 (1971) and *Brady v. Maryland*, 373 U.S. 83 (1963), both of which rest on federal due process grounds. But the *Hitch* decision soon passed through federal due process terrain and arrived at territory enclosed by state law alone. This occurred when the court observed that the breath ampoules under discussion were "no longer in existence and the court is therefore unable to ascertain whether such evidence was, or would have been, favorable to the defendant and material on the issue of his guilt or innocence". 12 Cal.3d at 648; 527 P.2d at 366, 117 Cal.Rptr. at 14. In discussing the questions of favorability and materiality the California Supreme Court cited to the rules applied in the "cognate context" involving "the failure or refusal of the prosecution to disclose the identity of an informer where under similar circumstances it cannot be established that the informer's testimony, which is of course unknown, is favorable and material." *Ibid*. The court then explained that the rule it employed in such situations required the defendant simply to show a "reasonable possibility" that the anonymous informant could give evidence on the issue of guilt which "might" result in the defendant's exoneration. 12 Cal.3d at 649, 527 P.2d at 366, 117 Cal.Rptr. at 14. The court cited and relied solely on California authority which established the rule. 12 Cal.3d at 648-49, 527 P.2d at 366, 117 Cal.Rptr. at 14.

Specifically, *Hitch* cited *Price v. Superior Court*, 1 Cal.3d 836, 843, 463 P.2d 721, 83 Cal.Rptr. 369 (1970).

The heart of the *Hitch* case is its definition and analysis of the factors of favorability and materiality. California, under *Hitch*, has its own standards as to these two key factors, and those standards are independent from federal law. The fact that California has a different definition of materiality and favorability than that which flows from the federal constitution was recently reaffirmed in *Cordova v. Superior Court*, 148 Cal.App.3d 177, 195 Cal.Rptr. 758 (1983). *Cordova* involved the deportation of illegal aliens who, along with the defendant, had been arrested in a residence at which narcotics were found. Relying on the earlier California case of *People v. Mejia*, 57 Cal.App.3d 574, 129 Cal.Rptr. 192 (1976), defendant sought dismissal of various narcotics charges. In *Mejia* the court had ruled, under facts similar to *Cordova*, that the deportation of illegal aliens had deprived the defendant of material witnesses. *Mejia*, in turn, relied on the test for materiality which California applies to the failure to reveal the identity of informers. See 57 Cal.App.3d at 580, citing *Williams v. Superior Court*, 38 Cal.App.3d 412, 112 Cal.Rptr. 485 (1974), citing *inter alia*, *Price*, *supra*.

In *Cordova* the state argued that *Mejia* had been abrogated by this Court's decision in *United States v. Valenzuela-Bernal*, 458 U.S. 858 (1982). In *Valenzuela-Bernal* this Court placed on the defendant the burden of showing that a deported witness would have been material and favorable to the defense, a heavier burden than

California requires. *Id.*, at 870-71. The *Cordova* court accordingly reviewed California authority defining materiality and favorability in order to analyze whether the holding in *Valenzuela-Bernal* changed the California rule. It concluded that the concept, as defined both in the context of informers and in the "*Hitch*" context, "has, in effect and in practice, become a California doctrine of independent existence". 148 Cal.App.3d at 184, 195 Cal.Rptr. at 761. It therefore declined to follow *Valenzuela-Bernal*. 148 Cal.App.3d at 185, 195 Cal.Rptr. at 762. Thus, for example, in California, when the state loses test results of a drug's presence, and the loss makes it impossible for the defendant to show materiality, the defendant need only deny having ingested the drug. *People v. Moore*, 34 Cal.3d 215, 221, 666 P.2d 419, 193 Cal.Rptr. 404 (1983). But, as *Cordova* points out, this rule flows only from California's independent state test of materiality, not from principles of federal due process.

To summarize, if we accept petitioner's argument that *Hitch* and its progeny (which includes the case at bench) utilize a broader definition of materiality and favorability than that found in *Brady* and its progeny, it must in turn be concluded that the divergence flows from the fact that *Hitch*'s test of materiality and favorability is based on independent state grounds. The question then becomes whether the writ of certiorari should be dismissed as improvidently granted because the decision below rests on independent state grounds.

In *Michigan v. Long*, — U.S. —, 77 L.Ed.2d 1201 (1983), this Court discussed the situations under which

it will find lack of jurisdiction because the decision below rests on independent state grounds. The test set forth in *Long* is that where "a state court decision fairly appears to rest primarily on federal law, or to be interwoven with federal law, and when the adequacy and independence of any possible state law ground is not clear from the face of the opinion, we will accept as the most reasonable explanation that the state court decided the case the way it did because it believed federal law required it to do so". 77 L.Ed.2d at 1214. In arriving at this test the Court weighed and balanced competing policies. On one hand, the test takes into account the court's traditional "[r]espect for the independence of state courts, as well as the avoidance of rendering advisory opinions". *Ibid.* On the other hand, the test takes into account the Court's obligation to determine the validity under the federal constitution of the state action. *Id.*, at 1215.

This Court in *Long* did not abandon the established doctrine that it must determine for itself whether a state court decision rests on an adequate nonfederal basis and that in doing so, it is not bound by the view taken by the state court. *Staub v. Baxley*, 355 U.S. 313, 318 (1958); *First National Bank v. Anderson*, 269 U.S. 341, 346 (1926). Here the California court of appeal stated that the "*Hitch* rule implements a federal due process standard". J.A. 158. The court below engaged in no analysis of the state law underpinnings of *Hitch* in so concluding. Yet, as previously demonstrated, *Hitch's* own analysis of *Brady* sprang from California law and thus parted com-

pany with federal law from the outset. Further, as noted, recent California decisional law makes clear that the test for materiality and favorability in the informant context, the deported-witness context and the *Hitch* context, is grounded on state law. *Cordova, supra*. Therefore, amicus respectfully submits that the court of appeal was incorrect and that a close study of *Hitch* and its progeny plainly reveals that it is founded on state law.

This Court, . . . , reviews judgments, not statements in opinions. . . . At times, the atmosphere in which an opinion is written may become so surcharged that unnecessarily broad statements are made. In such a case, it is our duty to look beyond the broad sweep of the language and determine for ourselves precisely the ground on which the judgment rests. This means no more than we should not pass on federal questions discussed in the opinion where it appears that the judgment rests on adequate state grounds. *Black v. Cutter Laboratories*, 351 U.S. 292, 297-98 (1956).

In sum, while the court below made a "plain statement", *Michigan v. Long, supra*, 77 L.Ed.2d at 1214-15, that its decision was based on federal due process, in reality, its decision—based as it was on *Hitch*—was founded on adequate state grounds.

Although this Court in *Long, supra*, has noted that it will look no further than the face of the lower court's opinion, it must not blind itself to the true nature of the issues before it either by accepting an erroneous statement by the court of appeal or by failing to acknowledge the impact of intervening state decisional law which clarifies the existence of adequate state grounds. *Black*

v. *Cutter Laboratories, supra*; *People v. Cordova, supra*.⁷ This Court, in an analogous context, dismissed as improvidently granted the writ of certiorari in *Piccirillo v. New York, supra*, 400 U.S. at 549, because an intervening state court decision clarified the status of New York law. Thus, after briefing and oral argument in *Piccirillo*, a state court of appeal's decision was rendered making it clear that transactional immunity is required in New York and, significantly, indicating that such court's earlier decision in the case at bar may have rested on the premise that immunity was required. *Id.*, at 548-49. This Court therefore dismissed the writ of certiorari.

The principles of *Michican v. Long, supra*, regarding the "plain statement" rule, 77 L.Ed.2d at 1215, n. 7, similarly apply to the plain statement of a state case, decided after the lower court's opinion, that the doctrine under review rests on independent state grounds. Applying such an analysis to the case at bar, it appears that since *Hitch* and its progeny rest on California law for their adaptation of *Brady* principles, the writ of certiorari should be dismissed as improvidently granted. *Jan-kovich v. Indiana Toll Road Commission*, 379 U.S. 487 (1965); *Wilson v. Loew's, Inc.*, 355 U.S. 597 (1958); see *Cook v. Hudson, supra*.

⁷ For a discussion of the effect of intervening court decisions or statutory changes, see, *supra*, argument I.

THE STATE HAS AN OBLIGATION UNDER THE FEDERAL DUE PROCESS CLAUSE TO PRESERVE MATERIAL EVIDENCE IN ITS POSSESSION

In a broad-based attack, never made below, petitioner now primarily denies that it has any constitutional duty to preserve physical evidence it has taken into its possession in the investigation of a criminal offense. Amicus contends that decisions recognizing such a duty to preserve evidence are simply logical extensions of this Court's rulings in *Brady v. Maryland*, *supra*, and other decisions "in what might loosely be called the area of constitutionally guaranteed access to evidence". *United States v. Valenzuela-Bernal*, *supra*, 458 U.S. at 867.

In *Brady*, *supra*, this Court held that the prosecution has a duty to disclose, upon request, all evidence favorable to the accused and material either to guilt or punishment. See also *Moore v. Illinois*, 408 U.S. 783, 794 (1972). The rule was later clarified in *United States v. Agurs*, 427 U.S. 97 (1972). There it was emphasized that the overriding concern of the *Brady* rule is the "justice of the finding of guilt". *Id.*, at 112. To the extent suppression of evidence results in denial of a fair trial, it violates due process. *Id.*, at 114. In *Agurs*, three situations involving application of the *Brady* rule were analyzed, and this Court essentially established a balancing test which takes into account the materiality of the evidence, its likely impact on the truth-seeking function of the trial process and the prosecutor's knowledge of the first two factors.

The first situation is when undisclosed evidence shows that the prosecutor knew or should have known the government case included perjured testimony. Because of the corruption of the truth-seeking function of the trial, strict standards of materiality are enforced. *Id.*, at 103-04.⁸ The second situation involves pretrial requests for specific evidence. The function of the request is to give the prosecution notice that the defense considers the evidence material. In those situations, evidence is deemed material if it "might have affected the outcome of the trial". *Id.*, at 104. When such requests are made and the evidence is material or there is a "substantial basis" for believing it to be so, the prosecutor must disclose it or submit the matter to the trial court. *Id.*, at 106.⁹

Finally, where no request is made or the request is so general that it does not really inform the prosecution of what the defense wants, the prosecutor is not expected to be able to recognize every item of evidence which might affect the outcome of the trial. In this situation, the prosecutor is expected to exercise pretrial judgment and resolve doubtful questions in favor of disclosure. *Id.*, at 108. But whether the prosecutor has violated the duty to disclose must be assessed in light of the impact the non-disclosed evidence has on the finding of guilt. If it creates a reasonable doubt, the judgment must be reversed. *Id.*, at 112-113.

In *United States v. Bryant*, 439 F.2d 642 (D.C. Cir. 1971), the reasoning of which was found persuasive in

⁸ In those cases, reversal is required if there is any reasonable likelihood the false testimony could have affected the verdict. *Id.*, at 103.

⁹ Cf. *United States v. Heiden*, 508 F.2d 898 (9th Cir. 1974).

People v. Hitch, supra, the court applied the reasoning of *Brady* in the context of lost evidence. The court found that the duty to disclose favorable evidence upon request was meaningless if it could be circumvented by the expedient of destroying the evidence before it was requested. It therefore held that "before a request for discovery has been made, the duty of disclosure is operative as a duty of preservation". 439 F.2d at 651.

The duty of preservation established in *Bryant* thus goes to that body of evidence described by the second situation in *Agurs, supra*. This Court stated there that the prosecution, upon request, must disclose evidence which might affect the outcome of the trial. *Bryant* simply says that such evidence may not be destroyed before the request occurs. *Bryant*, however, does not require that every loss of evidence be deemed a violation of due process. Relying on *United States v. Augenblick*, 393 U.S. 348 (1969), the court further held that loss or destruction of evidence does not violate due process concepts if the government shows that it has developed rigorous procedures designed to preserve the evidence and has followed the procedures in good faith. 439 F.2d at 651-652.

In the wake of *Bryant*, concerns were raised about the problem later addressed in *Agurs*, that is, how were investigating agencies to know which evidence to preserve? The pragmatic judicial response evidences concern that no insuperable burdens be placed on investigating agencies. In *Bryant* itself, the evidence was characterized as highly relevant as it was crucial to guilt or innocence. But in keeping with the idea that it is not

the prosecutor's function to determine what evidence is necessary for an adequate defense,¹⁰ the court established a duty to preserve all evidence that "might be favorable". *Id.*, at 652, n. 21, and related text. In California, the evidence must be saved "if there is a reasonable possibility that it would be favorable to the defendant on the issue of guilt or innocence". *People v. Hitch, supra*, 12 Cal.3d at 649, 527 P.2d at 367, 117 Cal.Rptr. at 15; *People v. Nation*, 26 Cal.3d 169, 176, 604 P.2d 1051, 1054, 161 Cal.Rptr. 299, 302 (1980).

But courts have been practical in applying the rules. The state has no duty to preserve when its officers cannot reasonably be expected to know that what they possess is material evidence. *Robinson v. Superior Court*, 76 Cal. App.3d 968, 975, 143 Cal.Rptr. 328, 332 (1978).¹¹ On the other hand, some classes of evidence have been held to be so crucial as to always be material. See, e.g., *People v. Moore, supra*, 34 Cal.3d at 221, 666 P.2d. at 422, 193 Cal.Rptr. at 407 (urine samples in probation violations involving use of drugs); *People v. Nation, supra*, (semen sample in rape case); *United States v. Harrison, supra*, (rough notes of witness interviews). The cases thus show an appreciation of the concerns prompting the notice requirement which were explicated in *Agurs*.

Bryant and progeny have simply been logical exten-

¹⁰ *Griffin v. United States*, 183 F.2d 990, 993 (D.C. Cir. 1950); *United States v. Harrison*, 524 F.2d 421, 428 (D.C. Cir. 1975).

¹¹ See also *People v. Hogan*, 31 Cal.3d 815, 851, 647 P.2d 93, 114, 183 Cal.Rptr. 817, 838 (1982); *State v. Clements*, 52 Or.App. 309, 628 P.2d 433 (1981); *State v. Maloney*, 105 Ariz. 348, 464 P.2d 795, 797-798 (1970).

sions of *Brady* and *Agurs*, necessary to effectuate the spirit of those cases and, more importantly, to obtain that which was their overriding concern: a fair trial through an uncorrupted fact-finding process. Yet, petitioner herein, citing *United States v. Augenblick*, *supra*, claims that no due process duty of preservation exists. *Augenblick*, however, did not state that no duty exists; it stated there was no violation because the government successfully bore its burden of showing why the evidence could not be produced. 393 U.S. at 355-356.

Petitioner's effort to establish its right to destroy physical evidence with impunity ignores the plethora of cases, both state and federal, which recognize the State's duty under the federal Due Process Clause to preserve material evidence in its possession.¹² While these deci-

¹² See *United States v. Picariello*, 568 F.2d 222 (1st Cir. 1978); *United States v. Miranda*, 526 F.2d 1319 (2d Cir. 1975); *Virgin Islands v. Testamark*, 570 F.2d 1162 (3d Cir. 1978); *Armstrong v. Collier*, 536 F.2d 72 (5th Cir. 1976); *United States v. Coe*, 718 F.2d 830 (7th Cir. 1983); *United States v. Doty* 714 F.2d 761 (8th Cir. 1983); *United States v. Sentovich*, 677 F.2d 834 (11th Cir. 1982); *Lauderdale v. State*, 548 P.2d 376 (Alas. 1976); *Scales v. City Court*, 122 Ariz. 231, 594 P.2d 97 (1979); *Garcia v. District Court*, 197 Col. 38, 589 P.2d 924 (1979); *Deberry v. State*, 457 A.2d 944 (Del. Super. 1983); *State v. Maluia*, 57 Haw. 428, 539 P.2d 1200 (1975); *People v. Bennett*, 82 Ill.App.3d 233, 402 N.E.2d 650 (1980); *Hale v. State*, 248 Ind. 630, 230 N.E.2d 432 (1967); *Tobias v. State*, 37 Md.App. 605, 378 A.2d 698 (1977); *State v. Brown*, 337 N.W.2d 507 (Iowa 1983); *People v. Eddington*, 53 Mich. App. 200, 218 N.W.2d 831 (1979); *State v. Hill*, 287 N.W.2d 918 (Minn. 1979); *State v. Craig*, 169 Mont. 150, 545 P.2d 649 (1976); *State v. Havas*, 95 Nev. 706, 601 P.2d 1197 (1979); *State v. Washington*, 165 N.J. Super. 158, 397 A.2d 1101 (1979); *Trimble v. State*, 75 N.M. 183; 402 P.2d 162 (1965); *State v. Larson*, 313 N.W.2d 750 (N.D. 1981); *State v. Clements*, *supra*; *Comm. v. Chapman*, 255 Pa. Super. Ct. 265, 386 A.2d 944 (1978); *State v. Parker*, 263 N.W.2d 679 (S.D. 1978); *State v. Wright*, *supra*; *State v. Amundson*, 69 Wis. 2d 554, 230 N.W.2d 775 (1975).

sions do not all agree on what constitutes "material evidence" or what degree of prejudice need be shown in order to reverse a conviction, they all disagree with petitioner's contention that the State has no duty to preserve material physical evidence in its possession.

Conceding that due process is not a static concept, petitioner would nonetheless have this Court ignore the fact that so many courts before it have considered the preservation of physical evidence so basic to the concept of a fair trial that they have held or assumed it was compelled by the Due Process Clause. "[D]ue process is . . . measured . . . by that whole community sense of 'decency and fairness' that has been woven by common experience into the fabric of acceptable conduct". *Breithaupt v. Abram*, 352 U.S. 432, 436 (1957). "The right of an accused in a criminal trial to due process is, in essence, the right to a fair opportunity to defend against the state's accusations". *Chambers v. Mississippi*, 410 U.S. 284, 294 (1973). Without the opportunity to examine and retest physical evidence upon which the prosecution case is based, at least where that evidence is subject to varying expert opinion, an accused does not have a fair opportunity to defend against the charges. *Barnard v. Henderson*, 514 F.2d 744, 746 (5th Cir. 1975).

The existence of the duty to preserve does not depend solely on the *Brady/Agurs/Bryant* line of cases. It also finds support in *United States v. Valenzuela-Bernal*, *supra*, and cases discussed therein.

In *Valenzuela-Bernal*, this Court assessed the defendant's claim that he had been denied both due process

and the right to compulsory process when the government deported two witnesses to his crime before the defense had the opportunity to interview them. *Valenzuela-Bernal* held that the government had no absolute duty to detain the witnesses; this holding was a recognition of the government's duty to enforce the immigration laws. *Id.*, at 864-66. Yet implicit in the decision is the notion that the government had the duty not to deport the witnesses if they could supply material evidence. Thus, sanctions were held appropriate if the defendant could show that the deportation deprived him of material, favorable evidence. *Id.*, at 873-74. Citing the language of *Augenblick*, *supra*, this Court stated that if the defendant could have shown that the witnesses' testimony would have been favorable and material, he would have shown a due process violation that so infected the fairness of the trial as to make it "more a spectacle or trial by ordeal than a disciplined contest." *Id.*, at 872.¹³

In recognition of the fact that the defendant had no access to the witnesses, *Valenzuela-Bernal* found it proper to relax the degree of specificity required in showing materiality compared to that required in a *Brady* situation or in a situation where the defendant claims impairment of the ability to mount a defense due to post-indictment delay. *Id.*, at 869-70. See *Barker v.*

¹³ This clarification of the cited language in *Augenblick* makes clear that petitioner's reliance on it, on *United States v. Loud Hawk*, 628 F.2d 1139, cert. den. 445 U.S. 917 (9th Cir. 1979), *United States v. Ortiz*, 602 F.2d 76 (9th Cir. 1979), and on *United States v. Traylor*, 656 F.2d 1326 (9th Cir. 1981), is misplaced. While establishing a rule requiring preservation of evidence akin to the rules the other circuit courts found implicit in the concept of due

Wingo, 407 U.S. 514 (1972).

Finding the deported witness situation more closely analogous to the undisclosed informer situation,¹⁴ this Court held that the same showing of materiality should be applied in order to obtain sanctions: the defendant must make some plausible showing that the deported witnesses' testimony would have been material and favorable. *Id.*, at 873-74. A showing of the events to which the witness might testify, and the relevance of those events to the crime charged, may demonstrate the required materiality. *Id.*, at 871. Reversal is required if there is a "reasonable likelihood that the testimony could have affected the trier of fact." *Id.*, at 873-74.

Valenzuela-Bernal and other "access to evidence" cases cited therein implicitly recognize the prosecutor's duty to retain material evidence for the use of the defense and require sanctions for violation of the duty. Although it places a heavier burden upon the defendant, *Valenzuela-Bernal's* "plausible showing" of materiality requirement is analogous to that established in *Hitch*, 12 Cal. 3d at 649, 527 P.2d at 367, 117 Cal.Rptr. at 15, and, in the context of physical evidence, is simply another way of stating the rule of *Barnard v. Henderson, supra*,

process, the Ninth Circuit in *Loud Hawk* held that its rule was not of constitutional dimension. It cited *Augenblick* for the proposition that destruction of evidence will rarely reduce the proceedings to "a spectacle or trial by ordeal" and, thus, a violation of due process. 628 F.2d at 1153-53. As discussed, *infra*, *Valenzuela-Bernal* holds that the *Augenblick* standard is met if the defendant makes a plausible showing that the lost evidence would have been favorable and the court concludes that there is a reasonable likelihood the favorable evidence could have affected the trier of fact.

¹⁴ See *Roviaro v. United States*, 353 U.S. 53 (1957); *McCray v. Illinois*, 386 U.S. 300 (1967).

i.e., a criminal defendant has the due process right to have an independent expert examine a critical piece of evidence whose nature is subject to varying expert opinion. 514 F.2d at 746.¹⁵

Assuming the police "possessed" the evidence, the court below had ample evidence to conclude that the breath samples were subject to varying expert analyses, that the defendants had made a "plausible showing" of materiality and favorability, or that there was a reasonable possibility that the evidence would be favorable to the defendants on the issue of guilt or innocence. On the question of "possession" the *Trombetta* court simply disagreed with *People v. Miller*, 52 Cal.App.3d 666, 125

¹⁵ The court below had evidence before it that varying expert opinion was possible regarding BAC. None of the devices approved for testing the alcoholic content of breath is infallible. J.A. 188. The Intoxilyzer is not specific for ethanol. *Ibid.* Rather, it reacts positively to six common solvents found in foods, the body or the laboratory, including acetone, butane, isopropyl alcohol and the ingredients in gasoline. J.A. 189. The machine could react positively if a person had inhaled butane from a cigarette lighter or had gasoline on his or her clothing at the time of the test. J.A. 190.

Moreover, the evidence was unquestionably crucial to a prosecution for driving under the influence. In most criminal violations physical evidence can include a variety of things. It is difficult for the police to know at the initial stages of the investigation which of these items of physical evidence will prove to be of importance, and when such a determination is made the physical evidence is usually intact for forensic analysis. But in an investigation for drunk driving, the police know that a sample of the suspect's breath will be the crucial, indeed the only, physical evidence, and it is obvious to all that when a breath sample is taken the suspect will have no meaningful opportunity later to retest a valid sample unless the police either obtain an extra sample along with the one they will use for testing or save some of the sample they test. Indeed, in California, it has been established for a decade that the results of breath tests are material and crucial to a fair trial. *People v. Hitch*, *supra*, 12 Cal.3d at 647, P.2d at 365-66, 117 Cal. Rptr. 13-14.

Cal.Rptr. 341 (1975), which held that the evidence was not possessed. While this Court may or may not agree with the *Trombetta* court on this issue, that finding is irrelevant to the question of whether there exists a general duty to preserve material evidence in the state's possession. If the due process right to a fair trial is to be meaningful, criminal defendants must have the opportunity to test critical physical evidence in the hands of the state, especially when, as here, the results of scientific analysis of the evidence by the prosecution are presumptive or conclusive evidence of guilt.

IV

REGARDLESS OF HOW IT IS CHARACTERIZED SEMANTICALLY, *BRADY* SHOULD BE APPLIED TO COVER THIS TYPE OF EVIDENCE IN LIGHT OF ITS UNIQUE AND FUNDAMENTAL CHARACTER

This case involves a unique and limited factual setting. Yet at issue is the defendant's right to a fair trial and the integrity of the fact-finding process. The results of breath tests are fundamental and crucial in prosecutions for driving under the influence of alcohol. Petitioner recognizes this and so does law enforcement. So important is this type of evidence that the state compels the drunk driving suspect to produce it. That suspect has no right to refuse to turn over a sample of his or her breath upon demand. But when the state is asked to return it so that the defendant can analyze it, it refuses. Indeed, the state has taken great care to obtain the breath in such a manner that it is destroyed after the testing de-

spite the ready availability of inexpensive, approved devices for its collection which would enable the defendant to have access to this crucial evidence.

Such conduct is simply unfair. Although much ado has been made about the semantics of this process, amicus urges this Court to apply the due process principles of *Brady v. Maryland, supra*, to this limited and narrow factual setting, regardless of whether the behavior by law enforcement is characterized as "gathering" or "preserving". Because of the strictly circumscribed parameters of the breath test issue, its central role in the fact-finding process, and the potential for widely varying results of expert testing, *Brady* and its progeny should apply. In short, the state should not be allowed to build its case against the defendant and then hide the critical cornerstone of physical evidence from him or her.

CONCLUSION

Amicus respectfully submits that this Court should dismiss the writ of certiorari as improvidently granted. Alternatively, the judgment of the California Court of Appeal should be affirmed.

Respectfully submitted,

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FILED

FEB 27 1984

ALEXANDER L. STEVAS.

CLERK

No. 83-305

IN THE SUPREME COURT
OF THE UNITED STATES

October Term, 1983

CALIFORNIA,

Petitioner,

v.

ALBERT WALTER TROMBETTA, et al.,

Respondents.

ON WRIT OF CERTIORARI
TO THE CALIFORNIA COURT OF APPEAL
FIRST APPELLATE DISTRICT

BRIEF OF AMICUS CURIAE
IN SUPPORT OF PETITIONER

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BRIEF OF AMICUS CURIAE
IN SUPPORT OF PETITIONER

Pursuant to Rule 36.4 of the rules of this Court, Robert H. Philibosian, District Attorney of the County of Los Angeles, State of California, submits this amicus curiae brief in support of petitioner. The County of Los Angeles is a political subdivision of the State of California, and Robert H. Philibosian is the authorized law officer of said county.

SUMMARY OF ARGUMENT

In its opinion in the case at bar, the California Court of Appeal held that when law enforcement authorities utilize an intoxilyzer to test the breath of a person arrested for driving under the influence of intoxicating liquor, federal due process requires, as a condition precedent to the admission of the test results as evidence in a criminal action, that they obtain and preserve another breath specimen for later retesting by the accused. In reaching its decision the California court failed to consider the impact of California Vehicle Code section 13354, subdivision (b), which permits the accused to have an independent blood alcohol test in addition to that administered by law enforcement authorities. The statute provides:

"(b) The person tested may, at his own expense, have a physician, registered nurse, licensed vocational nurse, duly licensed

clinical laboratory technologist or clinical laboratory bioanalyst, or any other person of his or her own choosing administer a test in addition to any test administered at the direction of a peace officer for the purpose of determining the amount of alcohol in his or her blood at the time alleged as shown by chemical analysis of his blood, breath, or urine. The failure or inability to obtain an additional test by a person shall not preclude the admissibility in evidence of the test taken at the direction of a peace officer."

In this amicus curiae brief we argue that this statutory right to an independent blood alcohol test, in itself, satisfies the requirements of due process. Through such an independent test, the accused will

be able to verify the accuracy of the original test administered by law enforcement authorities, and impeach the original test result at trial if it conflicts with the result of the independent test. In view of this right to an independent blood alcohol test, there is no need for law enforcement authorities, upon their own initiative, to preserve a separate sample of the accused's breath for later retesting. If the accused is concerned about the test's accuracy, he or she may exercise the right to take an additional test administered by a qualified person of his or her own choosing.

ARGUMENT

BY PERMITTING THE ACCUSED TO HAVE
AN INDEPENDENT BLOOD ALCOHOL TEST
ADMINISTERED BY A QUALIFIED PERSON
OF HIS OR HER OWN CHOOSING, CALI-
FORNIA VEHICLE CODE SECTION 13354,
SUBDIVISION (B), SATISFIES THE
DEMANDS OF DUE PROCESS

On the issue of whether the accused's right to an independent blood alcohol test satisfies due process guarantees, State v. Larson (N.D. 1981) 313 N.W.2d 750, is directly in point.¹ In Larson a peace officer administered a breath test on a breathalyzer to the defendant, who had been arrested for driving while intoxicated. The defendant later demanded that the state provide him with a separate sample of his breath for the purpose of conducting an

¹We have been unable to find any federal cases in point. Accordingly, in this brief we cite only state cases.

independent test. The state was unable to meet the request, as a separate breath sample had not been preserved. (The parties stipulated that it was physically possible to have preserved such a sample.) The defendant asserted that the state's failure to provide him with a breath sample for independent testing "lessens his ability to impeach the Breathalyzer results and constitutes a violation of his constitutional right to due process." (Id. at 752.)

The Supreme Court of North Dakota rejected the defendant's contention. The court observed that a state statute provided that "a person upon whom a law enforcement officer has administered a chemical test can have any qualified person of his own choosing administer a test or tests for his own use." (Ibid.)²

²The statute, section 39-20-02, N.D.C.C., provides as follows:

"Persons qualified to administer test. Only a physician, or a qualified
"footnote 2 continued"

Thus, "[i]f that person desires samples of his breath for independent testing he has the right to acquire those samples himself with the assistance of any qualified person he chooses." (Id. at 752.) The court concluded that by permitting such a person to obtain his own breath sample, the statute "affords him a fair and reasonable opportunity to scrutinize and verify or impeach the results of the Breathalyzer test administered by the law enforcement officer and, thereby, comports with the due process requirements of the Constitution." (Id. at 753.)

"footnote 2 continued"

technician, chemist, or registered nurse acting at the request of a law enforcement officer may withdraw blood for purpose of determining the alcoholic content therein. This limitation shall not apply to the taking of a breath, saliva, or urine specimen. The person tested may have a physician, or a qualified technician, chemist, registered nurse, or other qualified person of his own choosing administer a chemical test or tests in addition to any

"footnote 2 continued"

As authority for its holding, the Larson court relied upon the opinion of the New Jersey Superior Court in State v. Bryan (1974) 133 N.J.Super. 369, 336 A.2d 511. In Bryan the defendant also had been arrested for drunk driving and had taken a breathalyzer test. The ampoule used in the test had been discarded by law enforcement authorities. The defendant contended that the loss of the ampoule denied her due process of law, as she was unable to test the contents of the ampoule to verify the accuracy of the test results. The Bryan

"footnote 2 continued"

administered at the direction of a law enforcement officer. The failure or inability to obtain an additional test by a person shall not preclude the admission of the test or tests taken at the direction of law enforcement officer. Upon the request of the person who is tested, full information concerning the test or tests taken at the direction of the law enforcement officer shall be made available to him." (State v. Larson, supra, at 752 [emphasis in original].)

court found her due process argument to be without merit.

Like North Dakota, New Jersey also had a statute granting the accused the right to have an independent blood alcohol test administered by a person of his or her own selection. The statute, however, differed from North Dakota's in that it required the police officer to inform the arrestee of the right to an independent chemical test, while the North Dakota statute imposed no such duty. The Bryan court held that the "statutory mandate provides a means consistent with 'due process' by which a defendant may verify the test" to which he or she has consented. (Id., 336 A.2d at 514.) The court reasoned that "[t]he State should not be forced to afford the defendant a second chance to check the workability of the machine when defendant has the opportunity under [the statute] to an independent

test." (Ibid.)

Other cases are consistent with the reasoning in Larson and Bryan. In State v. Young (1980) 228 Kan. 355, 614 P.2d 441, the defendant was administered a breath test on a gas chromatograph intoximeter. He contended that the test results should be suppressed because law enforcement authorities did not provide him with a sample of his breath for independent testing, and due process required that he be given such a sample. The Supreme Court of Kansas observed that a state statute, K.S.A. 8-1004, affords the accused the right to secure an additional chemical test by a physician of his or her own choosing.³

³The statute provides:

"Without limiting or affecting the provisions of K.S.A. 8-1001 to 8-1003, the person tested shall have a reasonable opportunity to have an additional chemical test by a physician of his or her own choosing. In case the officer refuses to permit such additional chemical test to be

"footnote 3 continued"

(Like the North Dakota statute, the Kansas statute does not require law enforcement authorities to advise the accused of this right.) The Young court held that under the safeguards provided by this and other statutes, "the failure of the State to automatically furnish an accused with a sample of his own breath for independent testing is not a denial of due process." (Id., 614 P.2d at 447.)

In People v. Stark (1977) 73 Mich.App. 332, 251 N.W.2d 574, the defendant contended that the discarding of ampoules used in a breathalyzer test administered to him constituted a denial of due process. The Court of Appeals of Michigan noted that a state statute afforded the defendant an opportunity to have an independent blood alcohol test. Citing Bryan, the Stark

"footnote 3 continued"

taken, then the original test shall not be competent in evidence.'" (State v. Young, supra, 614 P.2d at 445.)

court concluded that "[t]his opportunity, which defendant did not exercise, renders his assertion of a due process violation less than persuasive." (Id., 251 N.W.2d at 576.)

In State v. Canaday (1978) 90 Wash.2d 808, 585 P.2d 1185, the Supreme Court of Washington held that the routine destruction and disposal of used breathalyzer test ampoules does not violate due process. The court observed that a person who has taken a breathalyzer test has the statutory right to an independent blood alcohol test administered by a qualified person of his or her own choosing, and that this right affords due process safeguards:

"Persons arrested and asked to take a breathalyzer test are uniformly offered the opportunity to obtain their own best evidence for use at any trial resulting from

the conduct leading to their arrest. They have the right to obtain an independent test of their blood alcohol content administered by a qualified person of their own choosing. RCW 46.61.506(5). They are informed of this right when asked to take the test. Although we do not believe failure to obtain an independent test could amount to a waiver of any recognized constitutional right to due process, the statutory requirement demonstrates an important protection of the subject's right to fundamental fairness which is built into our Implied Consent procedure. Moreover, the exercise of this right would yield test results contemporaneous with those obtained by the State,

which could have considerable force in rebutting the State's evidence. Washington's procedure cannot be said to be fundamentally unfair." (Id., 585 P.2d at 1190.)

In State v. Helmer (S.D. 1979) 278 N.W.2d 808, 812, the Supreme Court of South Dakota stated that "we agree with those courts that have held that the accused's ability to have an independent blood test taken to challenge the breathalyzer result is sufficient protection of an accused's due process rights. [Citations.]"

As in the cases cited above, California Vehicle Code section 13354, subdivision (b), provides the accused with an opportunity to have a second blood alcohol test administered by a qualified person of his or her own choosing. If the accused takes advantage of this opportunity and the test

result conflicts with that obtained by law enforcement authorities in the original test, then at trial the accused will be able to impeach the original test result. Due process requires no more than that the accused be afforded this opportunity. If, on the other hand, the police refuse to allow the accused to procure a timely blood alcohol test, due process requires the suppression of the original test result.

(Brown v. Municipal Court (1978) 86 Cal.App.3d 357, 361, 365, 150 Cal.Rptr. 216.)

The argument may be made, however, that the California statute fails to satisfy due process guarantees because it does not require the police to advise the accused of the right to procure a blood alcohol test on his or her own behalf.⁴

⁴This argument may be made by respondents, but not by defendants who are administered chemical tests of their

"footnote 4 continued"

This argument is without merit. In both State v. Larson, supra, and State v. Young, supra, similar statutes were deemed to comply with due process. Indeed, in Young the Supreme Court of Kansas specifically held that due process does not require such an advisement. The court reasoned "that all persons are presumed to know and

"footnote 4 continued"

breath in California after September 15, 1983. As of that date, a new statute, section 13353.5, was added to the California Vehicle Code which requires the police to inform the accused of the right to an independent chemical test and, upon the accused's request, to preserve a sample of the accused's blood or urine for later testing. (See Cal.Stats. 1983, c. 841, sec. 1.) The statute, which was enacted in response to the California Court of Appeal's decision in the case at bar, provides:

"(a) In addition to the requirements of Section 13353, a person who chooses to submit to a breath test shall be advised before or after the test that the breath-testing equipment does not retain any sample of the breath and that no breath sample will be available after the test which could be analyzed later by the person

"footnote 4 continued"

are bound to take notice of general public laws of the state where they reside, as well as the legal effect of their acts." (Id., 614 P.2d at 445.)

"footnote 4 continued"

or any other person.

"(b) The person shall also be advised that, because no breath sample is retained, the person will be given an opportunity to provide a blood or urine sample that will be retained at no cost to the person so that there will be something retained that may be subsequently analyzed for the alcoholic content of the person's blood. If the person completes a breath test and wishes to provide a blood or urine sample to be retained, the sample shall be collected and retained in the same manner as if the person had chosen a blood or urine test initially.

"(c) The person shall also be advised that the blood or urine sample may be tested by either party in any criminal prosecution. The failure of either party to perform this test shall place no duty upon the opposing party to perform the test nor affect the admissibility of any other evidence of the alcoholic content of the blood of the person arrested."

In People v. Kovacik (1954) 205 Misc. 275, 128 N.Y.S.2d 492, the court applied the same reasoning used by the Young court. In Kovacik the defendant attacked the constitutionality of a New York statute permitting the accused to have a physician of his own choosing administer a chemical test in addition to the one administered at the direction of the police officer. The defendant contended that the statute was unconstitutional because it did not require the police officer to notify the accused of this right. In upholding the statute's constitutionality, the court declared,

"It would seem that it is sufficient to say that all persons are presumed to know the law and are therefore presumed to be so informed as to this right. They should acquaint themselves, at

least with those laws most likely to affect their usual activities. The point is without merit." (Id., 128 N.Y.S.2d at 509.)⁵

⁵See also Prucha v. Department of Motor Vehicles (1961) 172 Neb. 415, 110 N.W.2d 75, in which the plaintiff contended that his driver's license was unlawfully revoked for refusal to take a blood alcohol test after his arrest for driving under the influence of intoxicating liquor. One of the grounds for his contention was that the police officer failed to advise him of the consequences of his refusal. The Supreme Court of Nebraska held that such an advisement was unnecessary, as "[t]he general rule is that all persons are presumed to know and are bound to take notice of general public laws of the country or state where they reside as well as the legal effect of their acts. [Citations.]" (Id., 110 N.W.2d at 80.) The Prucha court declared that the plaintiff "is presumed to know the law and he should acquaint himself, at least, with those laws which would affect him. [Citation.]" (Ibid.)

Furthermore, in Kesler v. Department of Motor Vehicles (1969) 1 Cal.3d 74, 78-79, 81 Cal.Rptr. 348, 459 P.2d 900, 904, the California Supreme Court also held that such an advisement was unnecessary. The Kesler court reasoned that "all that due process requires in the preservation of the rights of such persons is the availability of an opportunity for defendant to obtain a timely sampling of his blood in the manner required by law." (Id., 1 Cal.3d at 79, 459 P.2d at 904.)

Finally, in People v. Kerrigan (1967) 8 Mich.App. 216, 154 N.W.2d 43, the Court of Appeals of Michigan held that the police were not required to advise the accused of the right to an independent chemical test. The court reasoned: "The right in question on appeal is a statutory and not a constitutional right. While an accused must be advised of many constitutional rights, he need not be advised of

all of his statutory rights unless the statute expressly requires it." (Id., 154 N.W.2d at 45.)

In support of its holding in the case at bar, the California Court of Appeal majority and concurring opinions cited the cases of Garcia v. Dist. Court, 21st Jud. Dist. (1979) 197 Colo. 38, 589 P.2d 924 and Baca v. Smith (1980) 124 Ariz. 353, 604 P.2d 617.⁶ Neither of these cases, however, addressed the issue of whether due process demands would be met if the accused had the statutory right to have an additional blood alcohol test administered by a qualified person of his or her own choosing. Garcia and Baca, therefore can provide no guidance as to the resolution of this issue.

⁶In State v. Young, supra, 614 P.2d at 446, the Supreme Court of Kansas criticized both cases. (See pages 21-22 of the Petition for Writ of Certiorari.)

CONCLUSION

When the police administer a breath test to a person arrested in California for driving under the influence of intoxicating liquor, that person has the statutory right to have an additional, independent blood alcohol test administered by a qualified person of his or her own choosing. By exercising this right, the accused will be able to verify the accuracy of the breath test administered by the police. If the result of the accused's own test conflicts with the test result obtained by the police, the accused's test result will be admissible at trial to impeach the prosecution's evidence.

Due process requires no more than that the accused not be denied the opportunity to exercise the statutory right to an independent, additional chemical test. Due process does not mandate that law

enforcement authorities be transmuted into defense investigators obligated to collect and preserve evidence that might be favorable to the accused when the accused can do so through his or her own efforts. The imposition of such a burden upon law enforcement authorities would, without justification, radically alter their traditional

role in the criminal justice system and significantly increase the cost of enforcing drunk driving laws.⁷

Respectfully submitted,

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⁷ Although we understand that the competing interests involved are different, it is at least somewhat ironic that, if the contentions of respondent and the California Court of Appeal are accepted, law enforcement must go through whatever is required to literally capture the proverbial "breath of air" in a DUI prosecution, while law enforcement need not retain the body of the victim in a murder prosecution for independent analysis. (See People v. Vick (1970) 11 Cal.App.3d 1058, 1064-1066, 90 Cal.Rptr. 236. Juxtaposing the two situations highlights the fallacy of simply postulating that because breath samples are used by the prosecution to determine the

"footnote 7 continued"

"footnote 7 continued"

arrestee's blood alcohol content, other breath samples must be saved for the defendant. Due process simply requires that the defendant be afforded the opportunity to gather evidence regarding his blood alcohol content that will allow him to meet the prosecution evidence. California Vehicle Code section 11354(b) affords just such an opportunity.

DECLARATION OF SERVICE ON THE COURT
STATE OF CALIFORNIA }
COUNTY OF LOS ANGELES } ss.

The undersigned, Harry B. Sondheim,
is the Head Deputy of the Appellate Division of the Los Angeles County District Attorney's Office and a member of the bar of this court. On February 23, 1984, under the undersigned's supervision, Erlinda R. Maliksi, an employee of said office, placed in the United States mail, with first class postage prepaid, a box containing forty copies of the attached amicus curiae brief addressed as follows:

OFFICE OF THE CLERK
United States Supreme Court
Washington, D.C. 20543

Said amicus curiae brief was thus
mailed on February 23, 1984, which is
within the permitted time.

DATED: February 23, 1984

HARRY B. SONDEIM

DECLARATION OF SERVICE BY MAIL

STATE OF CALIFORNIA }
 } ss.
COUNTY OF LOS ANGELES }

I, the undersigned, hereby declare under penalty of perjury, that the following is true and correct:

I am a citizen of the United States, over eighteen year of age, not a party to the within cause and employed in the Appellate Division of the Office of the District Attorney of Los Angeles County, with offices located at 849 South Broadway, Los Angeles, California 90014-3296. I am under the supervision of Harry B. Sondheim, the head deputy of said division and a member of the bar of this court, at whose direction the service of the attached amicus curiae brief was made. On February 23, 1984, I served three copies of said brief on each of the following persons by depositing three true copies

thereof, enclosed in a sealed envelope with first class postage thereon fully prepaid, in the United States mail in the City of Los Angeles, in compliance with Supreme Court Rule 28, paragraph three, addressed as follows:

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FEB 25 1984

No. 83-305

IN THE

Supreme Court of the United States

ALEXANDER L. STEVAS.

October Term, 1983

THE PEOPLE OF THE STATE OF CALIFORNIA,
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ALBERT WALTER TROMBETTA, et al.,
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COURT OF APPEAL, FIRST APPELLATE DISTRICT

BRIEF OF THE STATE OF MINNESOTA
AND THE STATES OF FLORIDA, INDIANA,
MISSISSIPPI AND MONTANA AS
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IN THE
Supreme Court of the United States

October Term, 1983

No. 83-305

THE PEOPLE OF THE STATE OF CALIFORNIA,
Petitioner,

v.

ALBERT WALTER TROMBETTA, et al.,
Respondents.

ON WRIT OF CERTIORARI TO THE CALIFORNIA
COURT OF APPEAL, FIRST APPELLATE DISTRICT

BRIEF OF THE STATE OF MINNESOTA
AND THE STATES OF FLORIDA, INDIANA,
MISSISSIPPI AND MONTANA AS
AMICI CURIAE IN SUPPORT OF
PETITIONER THE PEOPLE OF THE STATE
OF CALIFORNIA

INTEREST OF AMICI CURIAE

This case involves breath tests in drunk driving cases. The specific question raised is whether a police officer, after having a driver submit to a breath test, must give the driver a sample of his breath for an independent analysis. The interests of amicus Minnesota and the other amici are similar.

In Minnesota there are more than 40,000 drunk driving arrests each year. Approximately two-thirds of those arrested

take a breath, blood or urine test. Most of these are breath tests.

The Minnesota bureau of criminal apprehension forensic science laboratory has made a thorough investigation of methods for collecting and preserving breath samples for subsequent testing. The laboratory has found that, while it is possible to collect and preserve a breath sample (or certain components thereof), available methods of preservation are unreliable and later analysis of such a sample produces inaccurate results.

SUMMARY OF ARGUMENT

This brief is submitted in support of the position of petitioner State of California.

The Intoxilyzer breath testing instrument used by California police analyzes a breath sample and then expels it. The instrument cannot preserve the sample that has been analyzed.

The California Court of Appeals held in these cases that a police officer must either preserve the sample analyzed by the instrument or collect another breath sample from the accused and preserve that. Since the Intoxilyzer cannot preserve a sample, the court's ruling in effect required the collection of a new sample. Because this was not done in these cases, the court held the test results inadmissible. The court based its decision on the rule of *Brady v. Maryland*, 373 U.S. 83 (1963), which requires a new trial when the defense has requested favorable, material evidence and the prosecution has failed to disclose it. That rule, however, applies only when the evidence is known to the prosecution and not to the defense. *United States v. Agurs*, 427 U.S. 97 (1976). That is not the situation here because in these cases the prosecution possessed no evidence unknown to the defense.

Moreover, *Brady* has nothing to do with either the procedures to be followed in analytical testing or the collection of additional evidence. It provides no basis for the procedural requirement that a breath sample be collected for the use of the accused whenever a breath test is administered to detect drunk driving.

The breath test procedures in these cases met due process requirements for admissibility. As for the California court's concern that the accused have a sample of his own to test, California statutes already allow the accused to make arrangements for his own tests.

For these reasons the California Court of Appeals erred in excluding breath test results, and its decision should be reversed.

ARGUMENT

I. INTRODUCTION.

Respondents were arrested for drunk driving. Following their arrests they provided two breath samples, each of which was analyzed by an Intoxilyzer instrument. After each analysis the breath sample was expelled from the instrument and the instrument was purged with clean air. The Intoxilyzer has no mechanism for retaining and storing a sample after it has been analyzed. The test results for every respondent showed an alcohol concentration over the legal limit of .10.

The California Court of Appeals held that due process required the police to preserve either the breath sample analyzed by the instrument or its equivalent (i.e., an additional sample) for the use of the defendant. The court based its decision on *People v. Hitch*, 12 Cal. 3d 641, 527 P.2d 361, 117 Cal. Rptr. 9 (1974),¹ which in turn relied on this Court's decision in *Brady v. Maryland*, 373 U.S. 83 (1963). *Brady* held that a defendant's due process right to a fair trial was violated when the prosecution suppressed material evidence that was favorable to the accused and that had been requested by the de-

¹ *People v. Hitch* held that the test and reference ampoules of a breathalyzer must be preserved for a defendant's future examination. While some states have followed *Hitch*, see *Lauderdale v. State*, 548 P.2d 376 (Alaska 1976); *Scales v. City Court of City of Mesa*, 122 Ariz. 231, 594 P.2d 97 (1979); *State v. Booth*, 98 Wis. 2d 20, 295 N.W.2d 194 (1980), other jurisdictions have not. See, *State v. Phillipe*, 402 So. 2d 33 (Fla. App. 1981); *People v. Godbout*, 42 Ill. App. 3d 1001, 1 Ill. Dec. 583, 356 N.E.2d 865 (1976); *State v. Gross*, 335 N.W.2d 509 (Minn. 1983); *State v. Cornelius*, 452 A.2d 464 (N.H. 1982). Amicus has found just one reported case where an attempt was made to analyze a preserved test ampoule. There, the expert witness was unable to perform an accurate analysis. *People v. Santiago*, 116 Misc. 2d 340, 455 N.Y.S.2d 511 (Sup.Ct. 1982). See also, *State v. Teare*, 135 N.J. Super. 10, 342 A.2d 556 (1975).

fense. Because *Brady* does not apply to the breath samples in these cases, the court erred.

II. THE CALIFORNIA COURT ERRONEOUSLY APPLIED THE *BRADY* RULE TO BREATH SAMPLES.

The California court incorrectly analyzed the issues when it applied the *Brady* rule to the breath samples in these cases. These are not cases in which the prosecution suppressed evidence that was unknown to the defense. Moreover, the court of appeals in effect required the collection of a new sample, not the preservation of the analyzed sample, whereas *Brady* imposes no requirement to collect additional evidence. The court of appeals, unlike other decisions applying *Brady* to situations where the evidence has been lost, did not decide to either affirm the convictions or dismiss the charges but instead excluded the breath test results. Thus the court actually was considering the admissibility of the tests and not any *Brady* issues.

A. *Brady v. Maryland* Does Not Apply to Breath Samples Blown Into An Intoxilyzer.

1. Factually, These Cases Do Not Constitute *Brady* Situations.

This Court noted in *United States v. Agurs*, 427 U.S. 97 (1976) that there are three quite different situations in which the *Brady* rule arguably applies. The three have one thing in common, however: each situation "involves the discovery, after trial, of information which had been known to the prosecution but unknown to the defense." 427 U.S. at 103. This factor is not present in these cases. In every case, the defense

knew just as much about the expelled breath samples as did the prosecution. There was nothing the prosecution could suppress even had it wished to. Thus, the one element essential to invoking the *Brady* rule was absent.

In addition, an examination of each of the three situations discussed in *Agurs* demonstrates that the *Brady* rule does not apply to these breath tests. In the first situation, the undisclosed evidence shows that the prosecution's case includes perjured testimony about which the prosecution knew, or should have known. See *Agurs*, 427 U.S. at 103. This situation obviously is not present.

The second situation, found in *Brady* itself, is characterized by a pretrial request for specific evidence. See *Agurs*, 427 U.S. at 104. Unlike *Brady*, in which the prosecution possessed the requested evidence, the prosecution in these cases did not have any breath samples to disclose when the requests were made. It was not a matter of hiding anything. Even if a request had been made at the time of the breath test, the prosecution could not have given a sample to the respondents because the instrument does not have the capacity to preserve one. The prosecution had no greater ability to capture a sample as it was expelled from the instrument than did the respondents.

In the third situation no request at all is made, or only a general request for "all *Brady* material." In this situation, the prosecution is under no obligation to disclose evidence unless it is obviously of such substantial value to the defense that fundamental fairness requires disclosure even without a specific request. See *Agurs*, 427 U.S. at 106-13. Because the breath samples in these cases contained alcohol concentrations in excess of the legal limit, they were not favorable evidence of substantial value to the defense. Therefore, the third *Brady* situation is not present.

2. There is No Evidence That Additional Analyses of the Samples Would Have Been Favorable to Respondents.

For *Brady* to apply, the allegedly suppressed evidence must have been both material and favorable to the accused. 373 U.S. at 87; see also *Giglio v. United States*, 405 U.S. 150 (1972). In *People v. Hitch*, there was some indication, although of questionable merit,² that the lost evidence might have favored the accused. By relying on *Hitch* in the instant cases, the California Court of Appeals has apparently created a presumption that the breath evidence would have been favorable to the accused.

In these cases, however, no such presumption is warranted. In fact, all the evidence supports the conclusion that the "lost" samples would not have been favorable to the respondents. Two samples from each respondent were separately analyzed and the results of the analyses were consistent. This makes it very unlikely that a third or fourth analysis would render favorable results for any of the respondents.

3. The *Brady* Rule Does Not Require Preservation Of A Breath Sample That Is Expelled From An Intoxilyzer As An Integral Part Of The Testing Procedure.

In spite of the foregoing, respondents may argue that, once a breath sample has gone into an Intoxilyzer instrument, the prosecution possesses evidence that must be preserved and given to the accused upon his request.

Brady did not deal with or impose any requirements for the preservation of evidence. There may, of course, be situations in which the loss of evidence constitutes suppression

² See n. 1, *supra* at 4.

under the *Brady* rule. Examples would be the destruction of evidence after it is requested or the destruction of evidence that "is so clearly supportive of a claim of innocence that it gives the prosecution notice of a duty to produce." *Agurs*, 427 U.S. at 107. These are not such cases, however.

Petitioner has aptly argued that there can be no preservation requirement if there has been no practical, physical possession of the evidence. Moreover this Court has never held that *all* evidence must be preserved once the government obtains it. In fact, this Court has observed:

As to petitioner's contention that the claimed destruction of the agents' notes admits the destruction of evidence, deprives him of legal rights and requires reversal of the judgment, it seems appropriate to observe that almost everything is evidence of something, but that does not mean that nothing can ever safely be destroyed. If the agents' notes of Ondrejka's oral reports of expenses were made only for the purpose of transferring the data thereon to the receipts to be signed by Ondrejka, and if, after having served that purpose, they were destroyed by the agents in good faith and in accord with their normal practice, it would be clear that their destruction did not constitute an impermissible destruction of evidence nor deprive petitioner of any right.

Killian v. United States, 368 U.S. 231, 242 (1961). *Killian* was decided before *Brady*. Since *Brady*, this Court has held, in a Jencks Act case in which an earnest effort was made to locate a lost witness statement (a tape recording), that the loss of the statement did not mean that the prosecution had suppressed it. *United States v. Augenblick*, 393 U.S. 348, 355-56 (1969).

The California Court of Appeals, in requiring breath samples to be preserved, relied not on these authorities but instead on the California decision in *People v. Hitch*. *Hitch* in turn based its holding on *United States v. Bryant*, 439 F.2d 642 (D.C. Cir. 1971). *Hitch* quoted with approval the following language in *Bryant*:

It is most consistent with the purposes of those safeguards [Brady and the federal discovery rules] to hold that the duty of disclosure attaches in some form once the Government has first gathered and taken possession of the evidence in question. Otherwise, disclosure might be avoided by destroying vital evidence before prosecution begins or before defendants hear of its existence. Hence we hold that before a request for discovery has been made, the duty of disclosure is operative as a duty of preservation.

Id. at 651. Although the California Court of Appeals in these cases did not expressly articulate this point, it apparently believed that the foregoing language from *Bryant* required the preservation of the breath samples.

In reaching such a conclusion, however, the California Court of Appeals misconstrued *Bryant*. *Bryant* dealt with a tape recorded conversation, not an ephemeral breath sample. *Bryant* relied at least in part on the fact that the scope of the discovery provisions found in Fed. R. Crim. P. 16(a) and 16(b)³ included tape recordings. There is no corresponding provision for the discovery of samples (as opposed to the discovery of the results of tests) since Fed. R. Crim. P. 16(a) (1) (D) provides for the discovery of the "results or reports"

³ The successor rules are Fed. R. Crim. P. 16(a) (1) (A) and (C).

of scientific tests and says nothing about the discovery of samples at all, let alone samples expelled during the testing process.⁴

In fact, one of the cases following *Bryant, United States v. Butler*, 499 F.2d 1006 (D.C. Cir. 1974), reached the same result as the foregoing analysis of Rule 16(a)(1)(D) and in effect held that *Bryant* required preservation of test results but did not require preservation of samples. In *Butler*, the defendant claimed the government had taken a urine sample from him and analyzed it for its alcohol concentration. The court remanded with instructions to consider sanctions if a sample had been taken and analyzed but to leave the conviction undisturbed if a sample had been taken, but not analyzed.

Thus, the D.C. Circuit, whose decision in *Bryant* was the apparent underlying authority for the decision of the California Court of Appeals in these cases, has in effect decided that it is the preservation of the test results, and not the sample itself, that is required. If this applies to a urine sample, which is much more readily collected and preserved than a breath sample, *a fortiori* it applies to a breath sample that is expelled during the testing process. *But see Government of Virgin Islands v. Testamark*, 570 F.2d 1162 (3d Cir. 1978).

⁴ Fed. R. Crim. P. 16(a)(1)(D) provides:

Reports of Examinations and Tests. Upon request of a defendant the government shall permit the defendant to inspect and copy or photocopy any results or reports of physical or mental examinations, and of scientific tests or experiments, or copies thereof, which are within the possession, custody, or control of the government, the existence of which is known, or by the exercise of due diligence may become known, to the attorney for the government, and which are material to the preparation of the defense or are intended for use by the government as evidence in chief at the trial.

The same conclusion results when *Bryant* is analyzed from another perspective. As discussed above,⁵ this Court in *United States v. Agurs*, said that *Brady* applies to information that is known to the prosecution and unknown to the defense. Unlike the expelled samples in these cases, the tape recording in *Bryant* was information that was known to the prosecution and unknown to the defense. Therefore, unlike the expelled breath samples, the tape recording was a situation to which *Brady* could apply if the other necessary prerequisites were present.

The California Court of Appeals, however, did not mention this distinction. Rather, it seized upon the sole similarity between the recording and the breath samples—namely, that neither the breath samples nor the recording was in existence any longer. *Bryant* never held that all evidence of any kind whatsoever must be preserved by the government. If it had, it would have been inconsistent with *Killian v. United States*, and *United States v. Augenblick*.

Bryant never purported to hold that the loss of any evidence at all requires a dismissal. Instead *Bryant* considered such things as the degree of bad faith, if any, of the prosecution; the importance of the lost evidence; and the evidence of guilt at trial. *Bryant*, in fact, is replete with suggestions that the agent's bad faith was responsible for the "loss" of the recording. 439 F.2d at 647, 650. There is no such suggestion of bad faith in these cases where the breath samples were expelled as an integral and unavoidable part of the testing procedure. Therefore, the implicit reliance on *Bryant* by the California Court of Appeals is misplaced and there is no *Brady* requirement to preserve a breath sample that is expelled during a test.

⁵ *Supra* at pp. 5-6.

B. The Court Was Not Really Requiring The Production Of The Breath Sample That Was Analyzed But Was Instead Requiring The Collection Of An Additional Sample For The Accused.

The California Court of Appeals required the preservation and subsequent production of either the sample that was analyzed or its equivalent. The court, however, recognized that the Intoxilyzer instrument is not designed to preserve samples after they have been analyzed when it stated:

[t]he question then is whether the specimen may be exhausted in testing without taking available steps to obtain and preserve another specimen for retesting.

Record, Petition for Certiorari, at A-14. The court, therefore, in effect required the police to take an additional breath sample from a drunk driver and store it in some manner that would allow him to analyze it if he so desired. (The court also quoted with approval a Colorado decision, *Garcia v. District Court*, 589 P.2d 924 (Colo. 1979), that required the police to give a drunk driver a separate sample of his breath at the time of the test.)

The *Brady* rule, of course, does not require and indeed is not concerned with the collection of additional evidence. The imposition of a requirement to collect additional evidence therefore has no basis of support in *Brady* and indicates that the actual rationale for the requirement is something other than *Brady*.

C. The Court's Decision Dealt Only With The Admissibility Of The Breath Tests Results, Whereas The *Brady* Rule Does Not Consider The Admissibility Of Individual Pieces Of Evidence And Instead Considers The Fairness Of The Trial As A Whole.

A drunk driving case does not depend on breath tests alone. Drunk drivers can also be convicted on the strength of the arresting officers' observations about their driving, appearance, demeanor and behavior. When a test result is .05 or lower, however, there is a presumption that the driver is not under the influence. 4 Cal. Veh. Code § 23.155, subd. (1). Obviously if an expelled breath sample had this alcohol concentration, an accused drunk driver would want to have it analyzed for his trial, even if the state's test results were excluded.

The *sine qua non* of *Brady v. Maryland* is that the suppression of evidence results in an unfair trial because the suppressed evidence is favorable to the accused and might therefore have affected the verdict. See *United States v. Agurs*, 427 U.S. 97, 104 (1976). A new trial with the suppressed evidence is the remedy.

Had the California court actually applied the *Brady* rule, it would necessarily have had to conclude that the "suppressed" breath sample was favorable to the accused. Such a conclusion would most likely be that the sample had a concentration of .05 or less. Under such circumstances the absence of the samples would have a very adverse impact on the respondents' cases, regardless of whether the other analyses were in evidence.

Since in these cases the samples have been exhausted and can no longer be analyzed, new trials would still lack the

samples. Thus, the only choices are outright dismissals or affirmances of the convictions. *United States v. Bryant*, 439 F.2d at 642. It was therefore for the Court to determine, pursuant to *Brady*, *Augenblick*, or even *Bryant*, whether the lack of the samples caused such an unfair trial that outright dismissal was in order. That the Court did not make such a decision, and instead excluded the breath test results, demonstrates that the Court was really concerned with the admissibility of the test results and not with the *Brady* rule.

Based upon the foregoing it is clear that the court was actually dealing with the breath test's admissibility. Thus, the issue to be decided is whether due process required that the test results be excluded because the police had not collected a sample for the accused.

III. DUE PROCESS DOES NOT REQUIRE THAT, AS A PREREQUISITE TO THE ADMISSIBILITY OF A BREATH TEST, THE POLICE GIVE AN ADDITIONAL SAMPLE TO THE DRUNK DRIVER FOR HIS OWN ANALYSIS.

The California Court of Appeals essentially decided that, for a breath test to be admissible, the police must furnish a drunk driver with a breath sample that he can have analyzed. Apparently, the California Court of Appeals wished to provide a drunk driving defendant with yet another way of evaluating and possibly attacking the accuracy of the breath test. California is, of course, free to impose by rule or statute whatever admissibility requirements for breath test results that it desires. It cannot, however, impose those requirements under the aegis of the Fourteenth Amendment unless due process requires them.

Even if there might be due process concerns about the admissibility of a scientific test in some cases, there are none in these cases because of the abundant checks on the accuracy of the test.

First, the instrument has been approved by the state department of health for breath tests. Record, Petition for Certiorari at A-6. Second, the health department has adopted regulations setting forth procedures to be used in breath testing. *Id.* at A-6. Third, the instruments were calibrated weekly. *Id.* at A-7.⁶ Fourth, the breath tests themselves comprised the analyses of two samples, the results of which were consistent. *Id.* at A-7. (When two separate samples give consistent results it is almost inconceivable that a third, reliable sample would give any different result.) Fifth, after each sample the instrument's chamber was purged with clean air and checked for a reading of zero alcohol. *Id.* at A-7.

Finally, if any of the respondents wished to have an additional test he had the statutory right to arrange a test for his own benefit. Thus, the breath sample evidence which respondents claim the police should have collected and given to them is peculiarly within respondents' control and susceptible to whatever evidence gathering procedures they might wish to employ. Certainly it is not a denial of due process if the police do not collect a sample for an accused who is perfectly free to arrange a test on his own behalf.

The absence of one potential basis for attacking the breath test's accuracy does not make a drunk driving trial unfair; and fairness is the ultimate criterion of due process. See *Brady*, 373 U.S. at 83. This is particularly true in these

⁶ The calibration records, together with some of the calibration solutions of known concentrations were available to respondents. Record, Petition for Certiorari at A-7.

cases, where the possibility is very remote that a third sample would yield evidence favorable to a defendant. A sporting theory of justice might assume that, if an accused received a third sample from the police, the presence of that sample and its possible analysis might somehow affect the jury's verdict. This Court, however, has rejected the sporting theory of justice and has refused to raise that trial strategy to the dignity of a constitutional right. See *United States v. Agurs*, 427 U.S. 97, 108 (1976); *Brady v. Maryland*, 373 U.S. 83, 90-91 (1963). Thus, even if there were a possibility that a police-supplied third sample might have affected the juries' verdicts in these cases, the lack of such a sample did not deprive respondents of fair trials.

In conclusion, the accuracy of breath tests does not rise to a constitutional level. Anything else is a matter that should be dealt with by statutes and rules of evidence. See *Miller v. California*, 413 U.S. 15 (1973); *United States v. Augenblick*, 393 U.S. 348 (1969).

CONCLUSION

The California Court of Appeals erroneously applied the rule of *Brady v. Maryland* to these cases. Its decision should be reversed.

Respectfully submitted,

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MOTION FOR LEAVE TO FILE BRIEF
AND BRIEF OF AMICI CURIAE,
NATIONAL DISTRICT ATTORNEYS ASSOCIATION, INC.,
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MOTION FOR LEAVE TO FILE
AMICUS CURIAE BRIEF

National District Attorneys Association, Texas District and County Attorneys Association, The Legal Foundation of America and Americans for Effective Law Enforcement respectfully move for leave to file the attached amicus curiae brief and would respectfully show the Court as follows:

1. *Interest of the Prospective Amici Curiae:*

The National District Attorneys Association, Inc. ("NDAA"), is a nonprofit corporation and the sole national organization representing state and local prosecuting attorneys in America. Its programs of education, training, publications, and amicus curiae activity carry out its guiding purpose, since its founding in 1950, of reforming the criminal justice system for the benefit of all of our citizens.

The Texas District and County Attorneys Association ("TDCAA") is a nonprofit association of more than 1000 elected district and county attorneys and their assistants in Texas. TDCAA performs functions on the state level similar to those performed by NDAA nationally.

Americans for Effective Law Enforcement, Inc. ("AELE") is a national not-for-profit citizens organization which is interested in establishing a body of law making the police effort more effective, in a constitutional manner. It seeks to improve the operation of the police function to protect our citizens in their life, liberties, and property, within the framework of the various state and federal constitutions. AELE has previously appeared as amicus curiae fifty-six times in this honorable Supreme Court and thirty-three times in other courts, including federal district courts and courts of appeals and the courts of the several states.

The Legal Foundation of America ("LFA") is a nonprofit corporation supporting the operations of a public interest law firm. Among other goals, it seeks to preserve a rational criminal justice system, in which adjudications of guilt or innocence are reliable rather than haphazard. The Foundation's attorneys have previously appeared as amicus curiae in this Court to urge this view. All litigation undertaken by the Foundation is approved by its Board of Trustees, the majority of whom are attorneys.

2. *Desirability of an Amicus Curiae Brief:* The potential impact of this case upon the criminal justice system is enormous. The principle at issue has been applied in the courts of California not merely to testing in drunk driving cases, but to evidence of every description. It has resulted in the suppression of evidence because of non-preservation of items that a reasonable officer could not have anticipated would be required to be preserved. Its application to functionally indistinguishable situations would produce unreasonable results. The administrative burden that would be imposed would itself be significant and would divert police officers from traditional functions in preventing crime. Amicus curiae briefing is desirable to show the full impact of the decision below.

3. *Reasons for Believing that Existing Briefs May Not Present All Issues:* Though California is clearly represented by careful and competent counsel, its brief must necessarily concentrate upon the complex instrument at issue (the intoxilizer) and upon prior decisional law. The controlling issues, however, are

general in application, and the decision of the court below presents an extraordinary case of first impression in this honorable Supreme Court. There is need for other views to show the full impact of the decision of the court below. In particular, these amici's experience with the practical aspects of criminal evidence and police methods for handling it will enable amici to assist the court in developing the issues fully.

4. *Nonduplication*: Amici have attempted to avoid duplication of the briefing of the petitioner State of California. For example, amici believe that counsel for California will thoroughly analyze the prior decisions of this Court relating to disclosure of evidence, and therefore, while we agree with California in this regard, we will not repeat those arguments. Instead, we confine ourselves to the effects of the decision below, and to the policy considerations defining due process in this context.

5. *Consent of Parties, or Requests for Consent*: Amici curiae timely requested consent of the parties. Petitioner California has consented, and its letter expressing consent is lodged with the Court. This motion is filed because the consent of respondents Trombetta et al. was requested but refused. The letter of respondents refusing consent is likewise lodged with the Court.

FOR THESE REASONS, Movants request that they be granted leave to file the attached amicus curiae brief.

Respectfully submitted,

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NO. 83-305

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1983

THE PEOPLE OF THE STATE OF CALIFORNIA,
Petitioner,
V.

ALBERT WALTER TROMBETTA, ET AL.,
Respondents.

BRIEF OF AMICI CURIAE,
NATIONAL DISTRICT ATTORNEYS ASSOCIATION, INC.,
TEXAS DISTRICT & COUNTY ATTORNEYS ASSOCIATION,
JOINED BY
THE LEGAL FOUNDATION OF AMERICA AND
AMERICANS FOR EFFECTIVE LAW ENFORCEMENT, INC.

INTEREST OF AMICI CURIAE

Paragraphs 1 and 2 of the Motion preceding this brief are incorporated at this point, as showing the interest of amici curiae.

STATEMENT OF THE CASE

Amici adopt the Statement of the Case made by Petitioner, the People of the State of California.

SUMMARY OF ARGUMENT

Amici will not repeat the case-law arguments made by Petitioner, although we agree with those arguments and wish to express support for them. Instead, we confine ourselves to policy issues concerning the impact of the decision below.

First, this is not only a drunk driving case. It concerns a principle of general application. The California courts have applied this principle to suppress a variety of items. There is no reasonable limit that can be logically inferred from the principle itself, and application to functionally indistinguishable cases would produce patently unreasonable results. In some instances, suppression has resulted when no one would have expected the evidence to prove relevant when it was disposed of. Efforts to place practical limits on such a principle would produce a haphazard, confusing jurisprudence, and there is no good reason for doing so when there is no indication that the evidence is exculpatory and all indications are that it is inculpatory.

Secondly, this principle would force police agencies to prefer less accurate or more intrusive evidence collection methods, in those instances in which a complex and unpredictable duty of preservation would otherwise apply. Third, it would distort the process of investigation and scientific inquiry by injecting adversary considerations at the earliest stages.

Finally, it would mean an explosive growth in administrative duties relating to police property warehouses. The only way that an officer can be sure he has complied with the California decisions is to collect and preserve the entire crime scene in every criminal case. Police property warehouses already hold an astounding volume of property and have great difficulty accounting for it. One of the fundamental issues in this case is whether due process requires the reassignment of large numbers of police officers from traditional functions in crime prevention to duties, instead, as warehousemen.

**I. THE DUTY OF COLLECTING EVIDENCE
SUGGESTED BY THE CALIFORNIA COURT
WOULD LEAD TO HAPHAZARD AND UN-
PREDICTABLE RESULTS.**

- A. *The duty created in this case is applicable to all cases and all types of evidence, not merely to drunk driving cases.*

The decision of the court below, like the decision in *People*

v. Hitch, 12 Cal.3d 641, 527 P.2d 361, 117 Cal. Rptr. 9 (1974),¹ is not merely a drunk driving decision. It announces a principle that is purportedly of general application. The prosecution is charged with a duty of collecting and preserving any evidence that *might* be useful to a defendant, even if there is no indication that it is exculpatory (and in fact, even if all indications are that it is inculpatory).

The scope of this principle is breathtaking. "A great deal of litigation has occurred since *Hitch* concerning the application of its doctrine" The appellate cases are only the tip of the iceberg, with many other issues litigated in trial courts. Johnson, *The Accidental Decision and How It Happens*, 65 CALIF. L. REV. 231, 236 (1977). For example, the *Hitch* approach has been used in the California appellate courts to suppress evidence of a telephone conversation when a tape recording was not preserved, as well as to suppress evidence of contraband when the vial containing it was destroyed (the *vial*, not the contraband, was what was not preserved). *People v. Alfieri*, 95 Cal. App.3d 533, 157 Cal. Rptr. 304 (1979); *People v. Swearingen*, 84 Cal. App.3d 570, 148 Cal. Rptr. 755 (1978).²

-
- 1 *People v. Hitch* concerned the breathalyzer, which bubbles the suspect's breath through an acidic solution. *Hitch* required preservation of the ampoule containing the test liquid. The present case, which concerns the intoxilyzer, is an application of *Hitch*. The intoxilyzer analyzes the suspect's breath directly, in gaseous form.
 - 2 In both of these cases, the unavailable evidence was relevant only to motions to suppress a confession or a seized item. In *Alfieri*, telephone tapes that were routinely erased were claimed by the defense to be circumstantially relevant to defendant's claim that he was denied an attorney. In *Swearingen*, the search and seizure issue depended upon the plain view doctrine, which in turn depended on the opacity of the missing vial. In both instances, extraordinary diligence would have been required for the police even to foresee that the items might have such relevance. (In *Alfieri*, the nonpreservation was held harmless error since the principal's conversations were not offered into evidence.)

As one commentator has written, the California Supreme Court issued its "groundbreaking first opinion" in *Hitch* "without being aware of the consequences." Johnson, *The Accidental Decision and How It Happens*, 65 CALIF. L. REV. 231, 234 (1977). Professor Johnson observes that the California justices apparently did not recognize that the *Hitch* decision announced a general principle applicable to any kind of evidence. As Professor Johnson says,³

. . . The court also seemed unaware that its reasoning could have an incalculable effect outside the area of drunk driving prosecutions. The police often dispose of some physical item that conceivably might have lead to evidence useful to the defense had it been preserved for defense inspection and testing. For example, by returning stolen property to the owner, the police deprive the alleged thief of the opportunity to have his own criminalist examine the property for fingerprints that might incriminate someone else What is disturbing is that the court's opinion showed no awareness of the problems it was creating.

Id. Professor Johnson labels the *Hitch* decision "extreme," "poorly considered," and "mishandled." He concludes: "A major decision of far-reaching practical effect had slipped through the California Supreme Court without the justices giving it more than superficial consideration." *Id.* at 235-37. This criticism is harsh, but it is not the only harsh commentary of this extraordinary decision.⁴

3 Professor Johnson avoids arguing whether the result in *Hitch* is correct. See note 8 *infra*.

4 Cf. Fernandez, Custom and the Common Law: Judicial Restraint and Lawmaking by the Courts, 11 SW. U. L. REV. 1237 (1979).

B. Application of this principle to functionally indistinguishable cases produces unreasonable results.

The logical implications of the principle underlying both *Hitch* and the present case would revolutionize the criminal justice system. If a police officer interviewed a witness, that witness' testimony would be subject to suppression under this principle, unless the officer had tape recorded the interview for later defense analysis. Similarly, an investigator's testimony describing a scene or an event would just as logically be suppressed because he could have taken a picture of it. If these applications seem far-fetched, it should be remembered that the California appellate courts have interpreted *Hitch* to require suppression on at least one occasion because a tape recording was not preserved. *People v. Alfieri, supra.*

The duty extends even further, with equal logic. Once the *Hitch* principle is accepted, it is impossible to say why the defendant should not be able to test the tape recorder itself, on the chance, however remote, that the recorder may have distorted the voice stresses of the speakers. A photograph should be inadmissible unless the lens used on the camera is made available for referee inspection. (Camera lenses can, in fact, be used to distort distances, sometimes significantly, and under *Hitch*, the defendant need not show that distortion was probable, but only that the possibility existed.) Even if the principle were confined to items analyzed or collected by scientific apparatus, the inference of any reasonable limit is difficult; radar evidence, for example, is based upon analysis of sound waves reflected from a moving object, and the technology exists to record these impulses with a sophisticated version of a tape recorder. Radar evidence in traffic cases thus presents a situation functionally indistinguishable from the case at bar.

Within the realm of drunk driving cases, there is no reason to limit this duty to chemical evidence alone.⁵ If, for example,

⁵ Whether the "reference" ampoule—a non-reacted sample of liquid used to calibrate the instrument—is also required to be preserved is

officers were to videotape drunk driving suspects performing field sobriety tests, defendant's counsel should object because the videotape does not show every action of the defendant that day. Did the camera fail to record defendant's earlier act of taking his driver's license from his wallet, or his later telephone call to counsel, or his dexterity in walking from the police car to the station, all of which acts defendant claims were performed in a manner showing sobriety? If the videotape fails to include these potentially exculpatory events, it would be inadmissible under the reasoning of the present decision.

Consideration of the broad range of physical evidence in other crimes also shows how difficult it is to place reasonable limits upon this decision. In a murder case, due process would be violated if investigators failed to secure any one item from the crime scene, because the item might have the fingerprints of an alternate perpetrator.⁶ To give one more example, even the remnants of seminal fluid extracted from a rape victim would be squarely within the rule of this case; a laboratory report of the examining physician's findings would be analogous to the intoxilyzer printout that was suppressed here.

C. *Efforts to limit this broad duty on an ad hoc, case-by-case basis would produce confusing and inconsistent decisions.*

Although the ultimate conclusion of the lower courts might be to reject some of these applications, the point is that the outcomes cannot be predicted because the reasons for distinctions are difficult to discern. Thus if limitation of the principle at issue here were left to a process of case-by-case evolution, a most

an open question. If it is required to be furnished, no logical reason exists for refusing to surrender all physical evidence of the steps used by the manufacturer and all ampoules from the same control number. Cf. Condit & Nicholson, Hitch, Due Process and the Macaulay Paradox, 52 L. A. B. J. 70 (1976).

6 Professor Johnson gives a virtually identical example. See text accompanying note 3 supra.

confusing jurisprudence would result. Efforts to explain such case-by-case results would make search and seizure law appear straightforward by comparison.⁷ Officers would begin to see cases dismissed in which they had acted reasonably and in good faith (the present case is an example). They would be charged with knowledge of a field of law filled with leaps of logic and unrelated to their traditional duties. Competent defense counsel would be compelled to move for suppression or dismissal whenever any conceivable argument could be made under this principle. The effect upon the courts would be much like that resulting from the fourth amendment exclusionary rule.

In the present situation, for example, the court below has reached a result precisely opposite that reached earlier in *People v. Miller*, 52 Cal. App.3d 666, 125 Cal. Rptr. 341 (1975). Officers' reliance on the admittance of intoxilyzer results in *Miller* thus leads, here, to suppression of the evidence. This conflict is not surprising, because there is nothing in *Hitch* that says that either *Miller* or the present decision is the correct one. Since the California Supreme Court denied hearing in both cases, the conflict endures, and California's law enforcement agencies cannot know how to deal with a common type of evidence in an important category of crime. If this narrow question of intoxilyzer results is not capable of clearer resolution upon general principles, the solutions to the infinite variety of other evidence collection situations must be distant indeed.⁸

7 Thus a judge dissenting in *People v. Swearingen*, *supra*, argued that *Hitch* should not be extended to that case because "it would not be in the best interest of criminal justice to extend the scope of the *Hitch* principle to encompass the issue of the credibility of a law enforcement witness during a hearing on a motion to suppress evidence pursuant to Penal Code section 1538.5".

8 Thus Professor Johnson was overly optimistic when he argued, The point here is not that *People v. Hitch* was necessarily incorrect. It may be desirable to place the police and prosecution under a wideranging duty to preserve potential evidence, and the courts are capable of devising suitable limitations on such a duty to take account of practical necessities

....

Such results might be justified if the evidence in question were in fact exculpatory (or even had some discernible probability of exculpation). But to impose these disadvantages on account of evidence that to all appearances is *inculpatory*, on the mere possibility that analysis *might* enable the defendant to turn up something exculpatory, is not a fair reading of the due process clause.

II. THE PRESENT DECISION WOULD FORCE LAW ENFORCEMENT AGENCIES TO PRE- FER LESS ACCURATE OR LESS DESIR- ABLE TYPES OF EVIDENCE.

The direct but unintended consequence of the decision below would be to induce police investigators to abandon the intoxilyzer in favor of other means of blood alcohol determination. Such alternate choices would be either more intrusive (such as blood extraction by needle), or less accurate (such as urine testing), or more prone to claims of human manipulation (such as the breathalyzer). If a complex and often unattainable duty of preservation is the price for the use of an efficient, accurate, and nonintrusive method of investigation, there will inevitably be some instances in which this price will force rational investigators to fall back upon methods that they would otherwise regard as inferior.

In the present case, for example, the State of California has concluded that technology for referee analysis of intoxilyzer results does not exist. The court below has nevertheless required such analysis as a condition to the use of the intoxilyzer. A fair-minded, reasonable law enforcement agency can only respond to this dilemma by adopting a different means of analysis, even though it might conclude that the intoxilyzer would otherwise provide the superior method of protecting the defendant's interests as well as the State's.

65 CALIF. L. REV. at 235. But as evidence of such "practical" limitations, Professor Johnson cites *People v. Miller*, *supra*, which the present decision repudiates.

This undesirable consequence would not be confined to drunk driving cases. A serious effort to require recording of radar impulses would force some officers to rely instead upon visual tracking of the suspect. Similarly, the ultimate extension of this due process principle would produce a climate in which officers would be unwilling to interview witnesses who declined to speak before a tape recorder. The likelihood of this effect increases when the generality and unpredictability of the duty is considered.

III. THE SUGGESTED DUTY WOULD DISTORT THE PROCESS OF INVESTIGATION AND SCIENTIFIC INQUIRY.

Extending the adversary process to the earliest stages of criminal investigation may distort the inquiry. A police officer investigating a homicide by an unknown suspect often sees a myriad of widely divergent leads, most of which turn out to be will o' the wisp. The decision of the court below would force an investigator in such a situation to alter his thinking radically, because the prosecution does not have the right to decide for the defense what theories are implausible. Nakell, *Criminal Discovery for the Defense and the Prosecution: The Developing Constitutional Considerations*, 50 N. C. L. REV. 437, 460 (1972). Such an approach would extend the adversary system to unprecedented lengths, would divert a process that should (at least in the initial stages) be an effort to discern truth, and would require the officer to perform both roles in the adversary process—a responsibility he “could not adequately discharge.” Nakell, *supra*, 50 N. C. L. REV. at 461.

The effect on the scientist would be more serious. “Conflicts arise between scientist and lawyer because the former attempts to describe evidence as it is, while the latter attempts to describe it in the light most favorable to his cause.” Thornton, *The Uses and Abuses of Forensic Science*, 69 ABA J. 288, 292 (1983). Thornton concludes that *People v. Hitch* may make the scientist “unable to give free expression to the scientific method:”

Consider, for example, *California v. Hitch*, 527 P.2d 361 (1974), in which the California Supreme Court held that breathalyzer ampoules should be retained for possible independent analysis by the defense. From a scientific viewpoint, there was no feasible way to preserve the highly acidic contents of the ampoule once the top had been removed and the analysis for alcohol performed. More important, replicated analysis at a later time would have been meaningless. The decision may have been correct from a legal standpoint, and no scientist would oppose the notion of independent examination, but it was foolish from the standpoint of science. Forensic science is not prepared to withstand this abuse. If conflicts are invariably resolved in favor of the law at the expense of science, it makes the forensic scientist somewhat less of a scientist and removes much of the justification for his being in the courtroom.

Id. at 291, 292.

This result would be particularly unfortunate because the adversary system itself contains safeguards against sloppy or biased investigation. As one public defender has written,

But if police use of poor techniques jeopardizes the effectiveness of the screening process, there are checks within the system that will put pressure on the police to reform their methods If the prosecution loses trials because of inadequate or unfair police investigation, the subsequent conduct of police investigations will begin to change. For example, when I worked at the Hunter's Point Public Defender, our office obtained acquittals in four successive sale-of-narcotics cases. The only evidence presented by the prosecution was the testimony of a single narcotics officer who had allegedly pur-

chased a few balloons of heroin from the defendants. The defense attorney chided the police and prosecution for choosing to rely solely upon the credibility of a police officer, when the case could have included marked money, an independent corroborating witness, or a "Fargo" device, a concealed transmitter worn by a person that relays a conversation to a hidden receiver. After acquittal in these four trials, the narcotics police in the Hunter's Point area made fewer arrests, but those they did make were replete with corroborating evidence. The innocent were thus better protected, no longer at the mercy of the unsubstantiated word of a single policeman.

Mitchell, *The Ethics of the Criminal Defense Attorney—New Answers to Old Questions*, 32 STANFORD L. REV. 293, 306 (1980).⁹ Thus if collection of a particular type of evidence is truly important to accurate determinations of guilt or innocence, juries will insist upon its collection. Conversely, if this kind of jury argument fails to produce the acquittals that would lead to revision of police methods, that outcome—across a large number of cases—is an indication that the evidence in question is of a type that the reasonable police officer would not have undertaken to collect.¹⁰

IV. THE BROAD DUTY OF PRESERVATION SUGGESTED BY THE CALIFORNIA COURT WOULD REQUIRE REASSIGNMENT OF

9 Mitchell also describes acquittals after defense criticism of the failure to preserve fingerprints or the failure to use reliable identification procedures. *Id.*

10 In addition, California goes to extraordinary lengths to preserve defendant's right to provide his own sample for his own analysis. See Brief of California; see also Petitioner's Reply to Respondents' Opposition to Certiorari at 7-9.

POLICE OFFICERS FROM TRADITIONAL FUNCTIONS TO ADMINISTRATIVE TASKS AS PROPERTY CUSTODIANS.

The California courts require law enforcement agencies to "show . . . that they have established, enforced and attempted in good faith to adhere to rigorous and systematic procedures designed to preserve [the missing evidence] If the prosecution fails to meet its burden the court shall apply sanctions" *People v. Hitch*, *supra*, 12 Cal.3d at 652-53, 117 Cal. Rptr. at 17-18, 527 P.2d at 369-70. This emphasis on "rigorous and systematic procedures" for warehousing property is the essence of *Hitch*. For example, when police lost a vial in which the suspect was alleged to have carried marijuana (the vial, not the marijuana, was what was lost), and the issue whether the vial was translucent became tangentially relevant to defendant's search and seizure motion, suppression was ordered because the police were not able to show that they had devised "systematic, rigorous" procedures even for identifying the vial as relevant, much less for preserving it. *People v. Swearingen*, 84 Ca. App.3d 570, 148 Cal. Rptr. 755 (1978).

The essential question is whether substantial numbers of police officers must be reassigned from traditional duties in crime prevention to duties, instead, as warehousemen.

A metropolitan police department already stores an astounding number and variety of items under current practices. For example, the Houston Police Department Property Warehouse stores an inventory estimated to be on the order of one hundred thousand to one million separate objects.¹¹ Each such item must be identified, classified, stored, retrieved, and ultimately disposed of. The transactions by which these items are received, transferred, removed, or destroyed number in the scores of thousands annually.

11 Interview with Lt. G. A. Gilbert and Capt. E. B. Goodrum, officers with supervisory responsibility of Houston Police Property Division, by David Crump, in Houston, Texas, Feb. 10, 1984.

The stored objects range from small items such as jewelry or currency stored in envelopes, to intermediate items such as televisions stored on warehouse racks, to very large items stored upon the warehouse floor.¹² Internal or external theft, preservation of perishable or delicate materials, inadvertent destruction, protection from liability in the event of improper disposition, loss, or misplacement, are all serious problems.¹³ In contested matters, particular items tend to be removed and restored multiple times as a result of settings and continuances, and each transfer increases the likelihood of misplacement. Since all transactions must be evidenced by signature, the accounting system must be manually operated; electronic computing equipment, though useful for some purposes, cannot function as the backbone of the storage and retrieval system for this reason. The sheer matter of storage space has forced the Houston Police Property Division to relocate three times in recent years and will soon require a fourth move. Internal paperwork is formidable, since the Property Division sends requests for authority to dispose of property to investigative officers every 90 days. Cf. Farber, *The Prosecutor: A Maze of Paper Work Without End*,

12 A visitor to the large-object part of the Houston Police Department Property Warehouse as of the time of the writing of this brief, for example, would be able to discern a collection of thirty-one allegedly stolen lawn mowers (including several large riding models), all tagged under a single identifying number relating to a case against a defendant accused of receiving stolen property. In a contiguous space, the visitor would see a structural steel door with forced-entry marks, which is a potential exhibit against several citizens charged with operating a gambling house. One section of the floor stores tires listed as stolen (or held as evidence for some other reason); another section is occupied by collections of major appliances allegedly misappropriated from apartments under construction; still another area contains an assortment of large-screen televisions. Thousands of other items in an indescribable variety surround these objects.

13 Certain items, such as items awaiting chemical analysis, ballistics materials, and automobiles are stored elsewhere. In addition, there are dozens of law enforcement agencies, ranging from smaller city police forces to special operations such as the medical examiner's office, in the same county.

New York Times, June 28, 1983, sec. B at 2, col. 1 (reporting dismissal of case because property report not retrieved in time for start of trial).

The imposition of the duty recognized in this case would multiply the number of items to be stored by several times, particularly if, as in *People v. Swearingen, supra*, the duty of preservation extends even to a vial holding the contraband in question, which unexpectedly becomes relevant to credibility issues in a pretrial hearing. Given the difficulty of placing limits on the present decision, the conscientious officer would likely consider that the entire crime scene must be preserved for referee analysis. The diversion of police resources into warehousing tasks that such a principle would imply is itself a reason for concluding that due process does not require such a result when there is no perceptible tendency of the evidence to exculpate.

CONCLUSION

The decision of the District Court of Appeal should be reversed. This honorable Supreme Court should adhere to the requirement that the prosecution must disclose evidence on defense request when it is material and exculpatory. The Court should avoid extending this duty to evidence which is neutral or inculpatory on the possibility, not disclosed by any indication, that defense analysis may produce exculpatory arguments. In particular, the Court should not place upon the prosecution the crushing burden of creating "rigorous" and "systematic" procedures for preserving and retrieving all such items of evidence, a burden that has no logical limit.

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FEB 25 1984

ALEXANDER L. STEVAS

CLERK

IN THE
Supreme Court of the United States
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The People of the State of California,

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v.

Albert Walter Trombetta, *et al.*,

Respondents.

**BRIEF OF THE STATE OF NORTH CAROLINA
AS AMICUS CURIAE IN SUPPORT OF
THE BRIEF OF PETITIONER**

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1983

The People of the State of California,
Petitioner,

v.

Albert Walter Trombetta, *et al.*,
Respondents.

**BRIEF OF THE STATE OF NORTH CAROLINA
AS AMICUS CURIAE IN SUPPORT OF
THE BRIEF OF PETITIONER**

INTEREST OF AMICUS CURIAE

The State of North Carolina supports the position of the People of the State of California in this case, but it finds that the issues posed by California, on which the writ of certiorari was granted, and the arguments in the petition for the writ, generally presuppose that *People v. Hitch*, 527 P.2d 361 (Cal. 1974), correctly applies the due process disclosure requirements of *Brady v. Maryland*, 373 U.S. 83 (1963). The *Hitch* case required the State of California to preserve the acid-solution ampoules used when giving a chemical test of the breath to determine a driver's blood alcohol content. *Hitch* thus held that the by-products of *inculpatory* evidence must be temporarily preserved by a state, without request, to facilitate a later possible *Brady* disclosure request. The application of *Brady* to lost or destroyed evidence is a highly complex issue that the Court refused to constitutionalize on the equivocal facts in *United States v. Augenblick*, 393 U.S. 348 (1969), and nothing in any decision of this Court foreshadows or ratifies the extension of *Brady* made in *Hitch*. The State of North Carolina is concerned that the Court may accept the issues as framed by the parties, and either implicitly approve *Hitch* or fail to make it clear that the Court is refraining from giving plenary consideration to the maze of knotty issues involved in applying *Brady* to lost or destroyed evidence.

In addition to North Carolina's concern about a ruling which may place the law of discovery in criminal cases in a constitutional strait jacket, the State has a specific interest in the subject matter of the *Hitch* case. Following *Hitch*, the State of California found it expedient to get rid of almost all of its breath-testing instruments that used acid-solution

ampoules in making chemical tests rather than comply with the burdensome preservation requirements of that case. Thus, the petitioner has no particular need to attack *Hitch*. North Carolina has a chemical testing program that is conceded to be one of the better ones in the country, and it principally uses ampoule-based breath testing instruments. Law enforcement agencies throughout the State own more than 400 such instruments. Therefore, North Carolina has a strong interest in alerting the Court to the fact that perhaps the key scientific premise of *Hitch* is questionable. Most jurisdictions that have considered the ampoule-preservation issue have ruled contrary to *Hitch*.

SUMMARY OF ARGUMENT

Brady v. Maryland applies only to evidence still in existence and which is favorable to the defendant. This interpretation of due process should not be extended to all missing or destroyed evidence absent a showing that the evidence was favorable or that the prosecution was acting in bad faith. The suppression of competent, legally obtained evidence of the prosecution merely for the failure to preserve that evidence or corroborative by-products for defense retesting, which evidence may or may not have been requested and which may or may not be favorable, is not required as a matter of due process of law.

Even if due process were to require the preservation of potentially favorable evidence material to the case, there is no present basis for requiring a state to preserve the ampoules used in breath-testing instruments. The scientific basis upon which *Hitch* was decided is suspect at best. Scientific analysis of the test ampoule cannot, under available technology, yield credible evidence to corroborate

the original test results. Any other benefits to the defendant are trivial and not constitutionally material.

State legislatures and courts have generally imposed strict procedural requirements upon chemical testing programs designed to insure the integrity of test results, and these requirements are revised from time to time in the light of experience. There is thus no need to constitutionalize a rule of discovery with respect to these tests.

ARGUMENT

- I. THE *HITCH* DECISION IS AN UNWARRANTED EXTENSION OF THE *BRADY* DISCLOSURE DOCTRINE. THE DECISION COMPELS EXCLUSION OF COMPETENT EVIDENCE BECAUSE OF THE ROUTINE, NONMALICIOUS DESTRUCTION OF THE BY-PRODUCT OF THAT INCUPLYATORY EVIDENCE, AND REPRESENTS AN IMPROPER CONSTITUTIONALIZATION OF THE RULES OF DISCOVERY.

Until now, cases before the Court applying *Brady v. Maryland*, 373 U.S. 83 (1963), have involved evidence still in existence and as to which there was no doubt but that it was favorable to the defendant.¹ In this context, the motive of the police or prosecution in suppressing the evidence has

¹See *State v. Nerison*, 625 P.2d 735, 739 n.3 (Wash. App. 1981) (nonpreservation of filament of tail light in case involving automobile accident). This opinion suggests a different resolution of the policy issues than advocated in this brief, but poses the policy choices with more clarity than most.

been unimportant.² The courts are faced with a difficult policy choice, however, when evidence has been lost or destroyed, and it is impossible later to determine whether the evidence would have been favorable. If one can avoid *Brady's* due process disclosure requirement simply by destroying favorable evidence, a defendant's constitutional entitlement may be rendered nugatory.³ On the other hand, imposing a presumption that all lost or destroyed evidence was favorable to the defendant would cause havoc within the criminal justice system, given the large caseloads and scant resources that are the rule with most prosecutors and police. It is not the purpose of this brief to suggest the exact content of a middle-ground position, but to alert the Court to the need to explore this area. The issues involve much more than just chemical tests for alcohol, and the Court should consider the impact of any constitutionally-based evidence-preservation requirement generally upon all types of criminal cases.

A middle-ground rule something like the one announced for the Jencks Act and Rule 16 violations in *United States v. Augenblick*, 393 U.S. 348 (1969), may be a reasonable compromise. The prosecution would bear the burden of showing that there was no bad faith or inexcusable negligence by the police or prosecutor responsible for the disappearance of the evidence. If there is police or prosecutorial bad faith, the likelihood that the missing evidence was favorable becomes much greater.⁴

²*Brady v. Maryland*, 373 U.S. at 87: "We now hold that the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution."

³*United States v. Bryant*, 439 F.2d 642, 648 (D.C. Cir. 1971).

⁴*People v. Hitch*, 527 P.2d 361, 370 n.7 (Cal. 1974). This situation involving evidence no longer available for evaluation is distinguishable from that discussed in *United States v. Agurs*, 427 U.S. 97, 110 (1976).

A question remains whether a different rule should apply if the lost or destroyed evidence bears upon the integrity of evidence that is crucial to the case—so that, *if* favorable, disclosure would be required without request under *United States v. Agurs*, 427 U.S. 97 (1976).⁵ This is a sensitive issue that the Court will eventually have to resolve, but as a matter of logic the good faith or bad faith of the police and prosecution in causing the loss or destruction will still bear

⁵As discussed in the *Nerison* case cited in note 1 above, the definition of constitutional materiality set out in *Agurs* and the distinction between *Agurs* and *Brady* material (requiring a specific request), may not fit the case involving lost or destroyed evidence. One issue that has not been often addressed in ampoule-preservation cases has been whether it makes any difference if the conviction was obtained under an impaired driving standard as opposed to the per se standard (in which the offense consists of driving with more than a certain level of alcohol in one's blood). It is arguable that when the chemical test evidence bears upon the dispositive evidence in the case, anything that may bear upon the credibility of that evidence is more constitutionally material than when conviction may alternatively have been based upon evidence of impairment. See *State v. Booth*, 295 N.W.2d 194, 198 (Wis. App. 1980) ("direct evidence against the accused"). This is probably an artificial distinction, however, given the dynamics of drinking-driving trials. If there is sufficient constitutional error to require exclusion of the chemical test results, a new trial will be required in almost every case, for the verdict that a defendant was "under the influence" of alcohol or "impaired" may have been inescapably affected by the test evidence. If, at the time of retrial, the prosecutor's only option is to utilize a per se law, he would then be required to dismiss the case.

on the likelihood of the evidence's having been favorable.⁶ It is a great leap beyond the decisions of this Court to create, as a matter of due process, an automatic preservation requirement in anticipation of defense discovery requests, and to impose the sanction of excluding otherwise valid evidence, without regard to motive, because of the failure to furnish evidence that *might* impeach the evidence offered by the prosecution.⁷

⁶A case that reached a questionable result because of the failure of the court to consider the relevancy of bad faith is *State v. Boyd*, 629 P.2d 930 (Wash. App. 1981) (erasure of tape recording through misunderstanding). Compare *State v. Gilchrist*, 590 P.2d 809 (Wash. 1979). It is noteworthy that in *United States v. Bryant*, 439 F.2d 642 (D.C. Cir. 1971), upon which all the cases following *Hitch*'s due process rule heavily rely, two out of the three judges found "at the very least a hint of bad faith in the record." 439 F.2d at 647.

⁷The dictum from *United States v. Bryant* widely quoted by pro-*Hitch* courts is: "What we do know is that the conversations recorded on the tape were absolutely crucial to the question of the appellants' guilt or innocence. That fact, coupled with the unavoidable possibility that the tape *might* have been significantly 'favorable' to the accused, is enough to bring these cases within the constitutional concern. If the due process requirement is directed to evidence whose non-disclosure '*might*' have harmed the accused, its purpose clearly reaches the type of missing evidence at issue here. Were *Brady* and its progeny applicable only when the exact content of the non-disclosed materials was known, the disclosure duty would be an empty promise, easily circumvented by suppression of evidence by means of destruction rather than mere failure to reveal." *United States v. Bryant*, 439 F.2d at 648 (emphasis added).

Proponents of the *Hitch* ruling will maintain that a prophylactic rule is essential in drunk driving cases because they are so numerous and because the routine, nonmalicious destruction of ampoules was a standardized part of the testing procedure.⁸ This argument totally misses the mark. The large number of cases involved and the standardized practices that cause the ampoules to be disposed of are precisely matters to be addressed by discovery statutes and rules of court.⁹ The courts should not expand due process concepts beyond the traditional case-by-case analysis to constitutionalize discovery procedures. The Court said in *Weatherford v. Bursey*, 429 U.S. 545, 559 (1977):

There is no general constitutional right to discovery in a criminal case, and *Brady* did not create one; as the Court wrote recently, "the Due Process Clause has little to say regarding the amount of discovery which the parties must be afforded" *Wardus v. Oregon*, 412 U.S. 470, 474 (1973).

Although some courts have accepted as an appropriate

⁸See *People v. Hitch*, 527 P.2d at 369 ("prosecution . . . [must] show that the governmental agencies . . . adhere[d] to rigorous and systematic procedures designed to preserve . . .").

⁹Note that *Lauderdale v. State*, 548 P.2d 376 (Alaska 1976) is based, in part, on a discovery statute rather than the *Bryant-Hitch* due process analysis. Compare *State v. Humphrey*, 318 N.W.2d 386 (Wis. 1982), in which the lower court ruling of *State v. Booth* is apparently allowed to stand primarily because of the adoption of an ampoule-preservation statute by the legislature. It may be further noted that the parties in the case before the Court are arguing the impact upon its breath-preservation issues the adoption of emergency legislation in California of a statute mandating state assistance to a defendant in a drinking-driving prosecution in obtaining a back-up blood or urine sample when a breath test is taken and no breath sample is retained. Cal. Veh Code § 13353.5. Note also the Vermont statute cited in *State v. Fournier*, 340 A.2d 71 (Vt. 1975).

gloss on *Brady* both Judge Skelly Wright's dictum in *United States v. Bryant*¹⁰ and the *Hitch* extension of it to routine, nonmalicious instances of destruction,¹¹ others have questioned whether due process extends so far. See, for example, *Edwards v. Oklahoma*, 429 F. Supp. 668 (W.D. Okla. 1976), reversed apparently on other grounds, 557 F.2d 1119 (10th Cir. 1978);¹² *State v. Newton*, 262 S.E. 2d 906 (S.C. 1980); *State v. Helmer*, 278 N.W.2d 808 (S.D. 1979); *State v. Canaday*, 585 P.2d 1185 (Wash. 1978), See also *State v. Young*, 614 P.2d 441 (Kan. 1980) (involved breath sample request); *State v. Turpin*, 606 S.W.2d 907

¹⁰See quoted material in note 7, *supra*. This statement is a dictum because the court remanded for a further factual hearing and for the application of the *Augenblick* standard. The court indicated, though, the stringent constitutional gloss it announced in dictum would afterwards prevail: "in the future decision on the question of sanctions in cases such as these will be guided by the preservation requirement announced above, and negligence will be no excuse." 439 F.2d at 653.

¹¹Cases accepting the *Bryant-Hitch* gloss on *Brady*'s due process rule include *Scales v. City of Mesa*, 594 P.2d 97 (Ariz. 1979); *Garcia v. District Court*, 589 P.2d 924 (Colo. 1979); *People v. Santiago*, 455 N.Y.S.2d 511 (Supp. Ct., Trial Term, N.Y. County 1982) (but rejected ampoule-preservation requirement on scientific grounds); *State v. Larson*, 313 N.W.2d 750 (N.D. 1981) (but rejected ampoule-preservation requirement on scientific grounds); *State v. Michener*, 550 P.2d 449 (Or. App. 1976); *State v. Amundson*, 230 N.W.2d 775 (Wis. 1975).

¹²The Court of Appeals remanded for an evidentiary hearing because it was suspicious as to why the Breathalyzer operators destroyed the ampoules when the applicable regulations simply called for disposing of them. The court apparently did not grasp that the destruction was through dropping the opened ampoules in a large vat of water—to dilute the strong sulfuric acid solution in the ampoules.

(Tex. Crim. 1980) (involved inability of defendant to obtain statutorily authorized corroborative blood test).¹³ Several of these cases were based, in part, on the fact that the defendant may argue to the jury concerning the defense inability to corroborate the key chemical test evidence against him. Thus, when the ampoule is not preserved, the issue is one of weight to be given the chemical test evidence rather than admissibility.

Finally, it must be stressed that constitutionalizing discovery in the ampoule-retention situation imposes the drastic sanction of excluding the evidence of the chemical test unless a burdensome procedure of retention is instituted. This sanction does not comport with real-world probabilities with respect to the likelihood of significant error in the administration of chemical testing. As noted in *People v. Santiago*, 455 N.Y.S.2d 511, 516 (Sup. Ct., Trial Term, N.Y. County 1982): "As a general rule, any slight error in the operation of the breathalyzer, due to operator fault or mechanical defect will generate lower, rather than higher reading of blood alcohol percentage." The defendant's own expert in *People v. Stark*, 251 N.W.2d 574 (Mich. App. 1977), who had had extensive experience with chemical testing programs, found that there was error in only two percent of the cases involving verification of

¹³It should be noted that most state chemical test statutes give the defendant the right to arrange for his independent back-up test, but only a few mandate that the state assist the defendant in any significant way in obtaining the specimen for back-up testing. Some courts have held that this right to an independent test is an illusory one, as most defendants are unable to arrange for it. Other courts have used the right to obtain an independent test as a basis for rejecting any ampoule-preservation requirement. For a breath sample case turning in part on the right to an independent test, see *State v. Cornelius*, 452 A.2d 464 (N.H. 1982).

chemical test ampoules. The potential benefit to the defendant, if any, cannot possibly justify such a drastic sanction as exclusion of competent chemical test evidence.

II. THE *HITCH* RULE OF AMPOULE PRESERVATION IS NOT BASED UPON ACCEPTED SCIENTIFIC TECHNOLOGY, AND OTHER PROTECTIONS GUARANTEED BY STATE CHEMICAL TEST STATUTES AND DECISIONS ASSURE THE DEFENDANT OF DUE PROCESS.

The cases on ampoule preservation are a confusing welter. Perhaps the most important factor distinguishing them is not the quality of counsel or of the courts deciding them, but the quality of the scientific testimony, if any, presented in the case record. There are indeed chemists who specialize in appearing for the defense in chemical test cases to testify that it is feasible to preserve ampoules. In most instances this testimony is based more on theory than on practical field experience with testing instruments. On the other hand, among those forensic experts connected with state testing programs, some are obviously more scrupulously careful in their scientific testimony than others. In general, though, the state experts have more opportunity for field experience and are thus more reliable.¹⁴

In discussing ampoule-preservation issues, it is useful to note that almost all cases have involved either the Breathalyzer Model 900 or Model 900A. The two

¹⁴Perhaps the most dramatic illustration of the difference the expert makes is in the opinion in *People v. Santiago*, *supra*. This opinion is a must reading for anyone attempting to understand the ampoule-preservation cases spawned by *Hitch*.

instruments look almost identical, and the minor differences between the models are irrelevant to the issues involved in ampoule preservation. Therefore, in the following discussion the term "Breathalyzer" will be used without designating whether the instrument is Model 900 or 900A.¹⁵

The instrument under discussion in *People v. Hitch* was a Breathalyzer. The Supreme Court of California set out in a footnote¹⁶ a summary of the scientific findings made in the case. The court premised the decision on its being scientifically possible to retest the ampoule and its contents to determine four principal things:

1. Whether there was at least three milliliters of acid reagent solution in the ampoule.
2. Whether the solution contained the correct amount of the key ingredient—0.025 percent of potassium dichromate.
3. Whether there were any optical defects in the glass of the test ampoule or the comparison ampoule that may have affected test accuracy.
4. Upon a retest of the test ampoule, whether approximately the same test results were reached.

At the time *Hitch* was decided, the major controversy in the scientific community concerned the fourth finding. It is obvious the California court believed that a retest would

¹⁵The Breathalyzer Models 1000 at 1100 were automated instruments also using ampoules containing a chemical reagent. Maintenance was difficult with these models, however, and are not now widely used. The current Model 2000 Breathalyzer is based upon infra-red analysis of alcohol in the breath, and has no ampoules.

¹⁶*People v. Hitch*, 527 P.2d at 364, n. 1.

give a result similar to the original test result most of the time and thus provide a generally reliable "ballpark" check upon the accuracy of the test.¹⁷ Time, however, has proved this assumption wrong. As noted by the expert who proved reliable in *People v. Santiago*, *supra*, later retest results may unpredictably prove to be higher than, lower than, or about the same as the original result.¹⁸ Compare the benefits to the defendant from ampoule preservation listed by the court in the fairly recent case of *State v. Booth*, 295 N.W.2d 194 (Wis. App. 1980). The Wisconsin court lists the first three matters, omits the fourth, and adds a new one: if alcohol was in fact introduced into the test ampoule, the process of analysis will leave acetic acid as a by-product. Absence of acetic acid would prove that there was no alcohol in the defendant's breath.

The Committee on Alcohol and Other Drugs of the National Safety Council counts among its members almost all of the truly distinguished forensic experts in the United States and Canada who have practical field experience with chemical tests for alcohol. Shortly after the *Hitch* decision, the Committee issued a pronouncement that, using currently available technology, there was no feasible way known to preserve a Breathalyzer ampoule for later retesting and have any guarantee of accuracy. The Committee has at least twice reassessed the ampoule-

¹⁷*Ibid.* The court's finding was that passage of time and method of storage may affect the results and "that upon a retest the original test cannot be duplicated with 100 percent accuracy."

¹⁸*People v. Santiago*, 455 N.Y.S.2d at 517, n. 2.

preservation technology, and reaffirmed its pronouncement.¹⁹ The current situation on ampoule preservation now seems clear: the major benefit to the defendant assumed by the *Hitch* court to flow from its ruling is still not technically capable of being conferred. Given the trivial benefits to defendants embodied in the other corroborative checks enumerated by *Hitch* as amended by *Booth*, there is no compelling basis for constitutionalizing an ampoule-preservation requirement—even if one accepted the *Bryant-Hitch* gloss on *Brady* as correct. This position is reflected in the following relatively recent ampoule-preservation decisions: *People v. Santiago*, *supra*; *State v. Larson*, 313 N.W.2d 750 (N.D. 1981); *State v. Helmer*, 278 N.W.2d 808 (S.D. 1979); *State v. Canaday*, 585 P.2d 1185 (Wash. 1978).

¹⁹The original pronouncement of October 1975 was published in 23 J. Forensic Sci. 432 (July 1978). A reaffirmance made on October 21, 1981, was published in 3 Am. J. Forensic Med. & Pathology 273 (Sep. 1982). The subsequent reaffirmance of October 17, 1982, has not yet been published in the scientific literature. The 1975 statement read as follows:

Some issues have been raised in the California Supreme Court's decision in *People v. Hitch* and allied cases in which the court held that chemicals and ampoules used in breath test cases must be preserved for possible pre-trial examination and analysis by defendants should they so demand it. A review of the scientific merits of this position has been made. It is concluded that at the present time, a scientifically valid procedure is not known to be available for the reexamination of a Breathalyzer ampoule that has been used in the breath test for ethanol, in order to confirm the accuracy and reliability of the original breath analysis.

In the two journal articles cited above, the committee's name is given as the "Committee on Alcohol and Drugs"; this is because the committee has only recently changed its name to "Committee on Alcohol and Other Drugs."

An analysis of the purported benefits to the defendant of ampoule preservation currently being cited by pro-*Hitch* courts will make clear why they can be characterized as trivial. To take them in order:

1. **Amount of Reagent:** This benefit is the most substantial one. If there is less than three milliliters of the reagent in the ampoule, the Breathalyzer will give a falsely high reading. It is possible that an ampoule could be underfilled in the manufacturing process, and there must be a check to make sure that sufficient reagent is in a test ampoule. In the real world, however, the possibility that a defendant would be tested with an underfilled ampoule is extraordinarily small. First, the manufacturing process does not usually result in underfilling only certain ampoules out of a batch, and if all or a large number of the ampoules in a batch were underfilled the problem would be caught by the random testing of ampoules from each new batch that is customary in almost all jurisdictions. Second, the operational checklist that is universally used by Breathalyzer operators requires the operator as a preparatory step to gauge the ampoule to make sure the correct amount of reagent is present; and when this gauging of the ampoule is completed, the operator must check the appropriate block on the checklist. These checklists are available in court for verification that the operator followed the prescribed procedure in administering the test. These steps should so minimize the chance of underfilled ampoules in actual tests that a defendant's benefit from double-checking the volume of reagent would indeed be trivial.²⁰

²⁰State v. Helmer, *supra*, found volume checking to be the only benefit to the defendant, based upon the scientific evidence in its record, and further found the benefit not sufficiently material to require preservation.

- 2. Amount of Potassium Dichromate:** It is difficult to conceive of a situation in which a particular ampoule out of a batch would have an incorrect percentage of potassium dichromate in the reagent, as the reagent solution is mixed in a large quantity with extreme care and with manufacturer's checks before batches of ampoules are filled. If all ampoules in a batch had an incorrect percentage of potassium dichromate, this error would be immediately caught by the routine system checks that almost all jurisdictions require in approved breath-testing procedures. The chance of this error in an individual ampoule is much smaller than the chance that an ampoule would be underfilled. This supposed benefit to the defendant is thus also trivial.
- 3. Optical Defects:** In addition to checking for optical defects in the glass of the ampoules mentioned in *Hitch*, some courts have added a check for dirt or other contaminants on the exterior of either the test or comparison ampoule among the supposed benefits to defendants of preserving ampoules. As a practical matter, though, these benefits are most trivial. Optical defects would give incorrect results in a Breathalyzer test only in two situations. First, if the optical defect was so severe that insufficient light were to pass through the ampoule to allow completion of a test, there could be no valid test reading produced. When the test ampoule is compared to a standard ampoule, the instrument is balanced based upon this comparison—and such a defect would be apparent. The other possibility in which optical defects may distort test readings would occur when either the test

ampoule or comparison ampoule had a defect that affected the passage of light and the optical defect *moved* within the ampoule well. If the ampoule does not move—so that the light passage through an optical defect remains constant—the defect is immaterial, since the instrument has been balanced against another ampoule. All properly trained and licensed operators of Breathalyzers are instructed to guard against any vibrations of the instrument that may cause ampoules to rotate within the ampoule wells. In addition, Breathalyzers are designed so that ampoules fit quite snugly within their wells—to prevent the possibility of any distorting movement. Thus, the realistic possibility of error caused by optical defects is also most trivial.

4. **Presence of Acetic Acid:** As indicated, the absence of acetic acid would prove that there was no alcohol whatever in a defendant's breath sample. The likelihood, though, that a properly conducted Breathalyzer test would be subject to contamination that would give an apparent test reading of significance when the defendant had no alcohol in his breath is most rare. This fact can also be established by extrinsic evidence, *e.g.*, lack of impairment or no odor of an alcoholic beverage on a defendant's breath. In the real world, this supposed benefit to the defendant is also trivial.

In the case of readings that are close to a critical *per se* or presumptive level under a jurisdiction's statute, there would be a real benefit to defendants if there could be an effective retest of the ampoule as a guard against operator error. But, as has been shown, such a retest is not possible under

present ampoule preservation technology. Ironically, the technology for preserving breath samples, or the alcohol in them, though disputed also, is undoubtedly more nearly capable of providing a reliable double-check.²¹

It should be stressed, however, that the double-check to be provided by either preservation of ampoule or of breath samples would be most useful against inadvertent operator error.²² If an operator set out deliberately to manipulate the results, he would be able — unless extremely naive — to palm off ampoules or breath samples to match his false reading. Preservation would be of no utility.

The Breathalyzer Models 900 and 900A require more operator involvement in producing the results than do later automated instruments, and this has been a source of attack on them. A legislative committee in North Carolina investigated the possibility of shifting to other instruments that were completely automatic in operation—making operator manipulation or inadvertent error far more difficult. The findings were that these more complex automated instruments were more expensive to buy, quite a bit more difficult to maintain, and were not more accurate than the Breathalyzers now in use. In addition, a shift would cost several million dollars in instrument costs, without regard to the cost of retraining all operators.

²¹The irony lies in the fact that a breath-preservation requirement requires the state to *create* evidence for the defendant, and goes even further than *Hitch* beyond the boundaries of due process previously defined by the Court.

²²Inadvertent operator error is guarded against by the general fail-safe design of the Breathalyzer. The effect of most errors will be to give falsely low readings. See *People v. Santiago*, 455 N.Y.S.2d at 516.

The legislative method for reducing operator or instrumental error therefore was to amend the chemical test statutes to require two tests of a defendant's breath after January 1, 1985.²³ The results will not be admissible unless there is a close correlation of the two tests results, and the lower of the two readings will be used by the court. A concurrent amendment was adopted to make it somewhat easier for a defendant to secure his independent back-up test.²⁴ These changes in addition to previously-granted rights to consult counsel and have a witness review the testing procedure²⁵ show that the North Carolina General Assembly is responsive to the need to provide in a common-sense way for assuring the integrity of chemical test results.

A reading of the cases from other states cited in this brief makes it plain that the other states also have a substantial interest in requiring—by statute, agency regulation, court rule, and case law—procedures that will assure the integrity of chemical test results. Those states also change their procedural requirements over time in the light of experience. The requirements differ from state to state, but the pattern of the minimum procedures required in any state is sufficient to generate confidence. There is no question that the individual state discovery procedures applicable to chemical testing are usually not so rigid as those that *Hitch* would impose, but the State of North Carolina contends that adoption of those procedures is properly a matter to be left to the states. They have

²³N.C. Gen. Stat. § 20-139.1(b2) (1983).

²⁴See N.C. Gen. Stat. § 20-139.1(d) (1983): "... Any law enforcement officer having in his charge any person who has submitted to a chemical analysis must assist the person in contracting someone to administer the additional testing or to withdraw blood, and must allow access to the person for that purpose. . . ." (Emphasized language added.)

²⁵N.C. Gen. Stat. § 20-16.2(a) (1983).

demonstrated that they can be trusted in this area, and there is no compelling policy reason or precedent in this Court for imposing an expansive, rigid rule of due process as is embodied in *Hitch*.

CONCLUSION

The State of North Carolina urges the Court to reject the California courts' purported rule of due process, requiring the preservation of breath samples, on the fundamental ground that *Hitch* and its progeny are unwarranted extensions of *Brady*.

If the Court were to rule against a breath-preservation requirement on the narrower ground that this places an impermissible burden upon the prosecution to create evidence for the defense, North Carolina would urge the Court to guard against indicating any implicit approval of a constitutional doctrine that would require preservation of ampoules.

If the Court were to rule that due process requires an evidence-preservation doctrine in some instances, North Carolina would urge the Court to indicate that its decision in no way involves acceptance of the scientific premises of the *Hitch* decision.

Respectfully submitted,

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APPENDICES

APPENDIX A

CASES EXAMINED THAT REQUIRED AMPOULE PRESERVATION

Lauderdale v. State, 548 P.2d 376 (Alaska 1976).

Scales v. City of Mesa, 594 P.2d 97 (Ariz. 1979).

People v. Hitch, 527 P.2d 361 (Cal. 1974).

Note: Later cases from California applying the *Hitch* doctrine are not cited.

Garcia v. District Court, 589 P.2d 924 (Colo. 1979).

People v. Richter, 423 N.Y.S.2d 610 (Nassau County Ct. 1979).

State v. Michener, 550 P.2d 449 (Or. App. 1976).

State v. Simpson, 594 P.2d 425 (Or. App. 1979).

City of Lodi v. Hine, 318 N.W.2d 383 (Wis. 1982) (based upon statute).

State v. Booth, 295 N.W.2d 194 (Wis. App. 1980).

CASES EXAMINED THAT DID NOT REQUIRE AMPOULE PRESERVATION

State v. Superior Court, 487 P.2d 399 (Ariz. 1971) (overruled by *Scales v. City of Mesa* on above list).

State v. Cantu, 569 P.2d 298 (Ariz. App. 1977) (overruled by *Scales v. City of Mesa* on above list).

People v. Hedrick, 557 P.2d 378 (Colo. 1976) (overruled by *Garcia v. District Court* on above list).

State v. Phillipe, 402 So. 2d 33 (Fla. App. 1981).

People v. Godbout, 356 N.E.2d 865 (Ill. App. 1976).

People v. Reed, 416 N.E.2d 694 (Ill. App. 1981).

State v. Sutherburg, 402 A.2d 1294 (Me. 1979) (a non-Breathalyzer case using ampoule-based technology; challenge directed to failure to use available alternative method that would have preserved breath sample).

People v. Stark, 251 N.W.2d 574 (Mich. App. 1977).

State v. Hanson, 493 S.W.2d 8 (Mo. App. 1973) (based upon failure to lay foundation for challenge in record, despite state agency rule requiring ampoule preservation).

City of Cape Girardeau v. Geiser, 598 S.W.2d 151 (Mo. App. 1979) (rejected challenge because no objection made at trial as to failure to preserve ampoule).

State v. Bush, 595 S.W.2d 386 (Mo. App. 1980) (interpreted agency rule that requires ampoule preservation to apply only when there is an immediate request after the test; indicated doubt as to validity of result when ampoule retested).

State v. Shutt, 363 A.2d 406 (N.H. 1976).

State v. Bryan, 336 A.2d 511 (N.J. Super, Law Div. 1974).

State v. Teare, 342 A.2d 556 (N.J. Super, App. Div. 1975).

People v. Farrell, 444 N.E.2d 978 (N.Y. 1982).

People v. Amidon, 427 N.Y.S.2d 727 (Ontario County Ct. 1980).

People v. LePree, 430 N.Y.S.2d 778 (Rochester City Ct. 1980).

- People v. Santiago*, 455 N.Y.S.2d 511 (Sup. Ct., Trial Term, N.Y. County 1982).
- State v. Larson*, 313 N.W.2d 750 (N.D. 1981).
- State v. Grose*, 340 N.E.2d 441 (Ohio Mun. Ct. 1975).
- State v. Watson*, 355 N.E.2d 883 (Ohio App. 1975).
- Edwards v. State*, 544 P.2d 60 (Okla. Cr. 1975).
- Edwards v. Oklahoma*, 429 F. Supp. 668 (W.D. Okla. 1976), reversed apparently on other grounds, 577 F.2d 1119 (10th Cir. 1978).
- State v. Newton*, 262 S.E.2d 906 (S.C. 1980).
- State v. Helmer*, 278 N.W.2d 808 (S.D. 1979).
- State v. Turpin*, 606 S.W.2d 907 (Tex. Cr. 1980).
- State v. Canaday*, 585 P.2d 1185 (Wash. 1978).
- State v. Humphrey*, 318 N.W.2d 386 (Wis. 1982) (based upon lack of specific request; compare *City of Lodi v. Hine* in above list).

APPENDIX B

**STATES CURRENTLY USING SIGNIFICANT
NUMBERS OF THE BREATHALYZER MODELS 900
AND 900A IN ENFORCEMENT PROGRAMS***

Florida

Indiana

Massachusetts

Michigan

Minnesota

New Jersey

North Carolina

Ohio

Oklahoma

Pennsylvania

Rhode Island

South Carolina

Virginia

Washington

Wisconsin

*Information furnished by the current manufacturer of models of the Breathalyzer, the Smith & Wesson Electronics Company, Springfield, Massachusetts.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that he has this day served three copies of the foregoing Brief of Amicus Curiae to the Supreme Court of the United States upon the persons indicated below by depositing a copy of same in the United States mail, first class postage prepaid, addressed to the following:

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No. 83-305-CSY
Status: GRANTED

Title: California, Petitioner
v.
Albert Walter Trombetta, et al.

Docketed:
August 22, 1983

Court: Court of Appeal of California,
First Appellate District

Counsel for petitioner: Kirk, Charles R. B.

Counsel for respondent: DeMeo, John F., Haley, J. Frederick,
Kenney, Thomas R., Pettis, John A.

Entry	Date	Note	Proceedings and Orders
1	Aug 22 1983	G	Petition for writ of certiorari filed.
2	Sep 6 1983		Waiver of right of respondent Albert W. Trombetta to respond filed.
3	Sep 15 1983		Waiver of right of respondent Gregory Moller Ward to respond filed.
4	Sep 28 1983		DISTRIBUTED. October 14, 1983
5	Oct 7 1983		Waiver of right of respondents Cox, et al. to respond filed.
7	Oct 13 1983	P	Response requested. (Due November 12, 1983 - NONE RECEIVED)
9	Oct 27 1983		Order extending time to file response to petition until November 28, 1983.
10	Nov 30 1983		Brief of respondents Albert W. Trombetta, et al. in opposition filed.
11	Nov 30 1983		REDISTRIBUTED. January 6, 1984
12	Jan 5 1984	X	Reply brief of petitioner California filed.
13	Jan 9 1984		Petition GRANTED. *****
14	Feb 23 1984		Joint appendix filed.
15	Feb 23 1984		Brief of petitioner California filed.
16	Feb 23 1984	G	Motion of National District Attorneys Association, Inc., et al. for leave to file a brief as amici curiae filed.
17	Feb 23 1984		Brief amicus curiae of Minnesota, et al. filed.
18	Feb 23 1984	G	Motion of Appellate Committee of the California District Attorneys Association for leave to file a brief as amicus curiae filed.
19	Feb 27 1984		Brief amicus curiae of County of Los Angeles filed.
20	Feb 25 1984		Brief amicus curiae of North Carolina filed.
21	Mar 5 1984		Motion of National District Attorneys Association, Inc., et al. for leave to file a brief as amici curiae GRANTED. Justice Marshall OUT.
22	Mar 5 1984		Motion of Appellate Committee of the California District Attorneys Association for leave to file a brief as amicus curiae GRANTED. Justice Marshall OUT.
23	Mar 2 1984	D	Motion of respondents for divided argument filed.
24	Mar 10 1984		Record filed.
25	Mar 10 1984		Certified original record, 2 boxes, received.
26	Mar 12 1984		Writ of certiorari dismissed under Rule 53 as to Thomas Nelson Muldoon and James K. Schneider only.
27	Mar 19 1984		Motion of respondents for divided argument DENIED.

Entry	Date	Note	Proceedings and Orders
28	Mar 20 1984		SET FOR ARGUMENT. Wednesday, April 18, 1984. (2nd case)
29	Mar 26 1984		Brief of respondents Albert W. Trombetta, et al. filed.
30	Mar 26 1984		Brief amicus curiae of State Public Defender of CA filed.
31	Mar 26 1984		CIRCULATED.
32	Mar 24 1984	X	Brief amicus curiae of CA Public Defenders Assoc., et al. filed.
33	Mar 31 1984		Application for injunction filed with WHR (A-792).
34	Apr 3 1984		Response to application for injunction requested due April 9, 1984, close of business.
35	Apr 3 1984		Temporary order granting same by Rehnquist, J.
36	Apr 10 1984	X	Reply brief of petitioner California filed.
37	Apr 9 1984		Response to application for stay received.
38	Apr 10 1984		Stay granted by Rehnquist, J.
39	Apr 18 1984		ARGUED.